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Supreme Court, U.S.
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In The

Supreme Court of the United States

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JAMES R. KELLEY,

Petitioner,

vs.

COMMONWEALTH OF PENNSYLVANIA,
STATE EMPLOYEES' RETIREMENT BOARD,

Respondent.

◆

On Petition For Writ Of Certiorari
To The Pennsylvania Supreme Court

◆

PETITION FOR WRIT OF CERTIORARI

◆

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Dated: December 18, 2007

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QUESTION PRESENTED

Does the legislative enactment excluding the judiciary require strict scrutiny in its review pursuant to an equal protection challenge? Was Pennsylvania Commonwealth Court Judge Kelley unfairly denied the right to elect Class AA pension benefits enhancement for his fourteen and a half years of prior service as a Pennsylvania State Senator when the Amendments to the Pennsylvania Employees' Retirement Act [71 Pa.C.S.A. 5306(a)(a.1)(3)] created an arbitrary and unconstitutional prohibition that excluded judicial officers, yet allowed most other legislators and state employees to have enhancements for their prior legislative service? Did this arbitrary exclusion of judicial officers violate the equal protection clause of the United States Constitution, and was the appropriate standard of review due to the interference and infringement of the legislative branch of government with the judicial branch and judicial independence that of strict scrutiny?

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PETITION FOR WRIT OF CERTIORARI

The Petitioner, Judge James R. Kelley, respectfully requests this Honorable Court issue a Writ of Certiorari to review the Opinion of the Supreme Court of Pennsylvania rendered on September 26, 2007, which upheld the equal protection challenge to 71 Pa.C.S.A. 5306 (Appendix D) and denied Judge Kelley the right to elect enhanced pension benefits for his prior state legislative services solely because he was a judicial officer.

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OPINIONS BELOW

The Opinion of the Supreme Court of Pennsylvania was filed on September 26, 2007 and is reported at *Kelley v. State Employees' Retirement Board*, 932 A.2d 61 (Pa., 2007). The Opinion is attached as Appendix A. The Pennsylvania Supreme Court reversed the Pennsylvania Commonwealth Court, which found 71 Pa.C.S.A. 5306 to be in violation of the equal protection clause for Class AA benefits. Attached and marked as Appendix B is the Opinion of the Commonwealth Court of Pennsylvania entitled *Kelley v. State Employees' Retirement Board*, 890 A.2d 1173 (Pa. Comm., 2006). Attached and marked as Appendix C is the Opinion of the Hearing Examiner of the State Employees' Retirement Board dated September 14, 2004.

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JURISDICTION

The Opinion of the Supreme Court of Pennsylvania was entered on September 26, 2007. This Petition for Writ of Certiorari is filed within the ninety day time period as allowed by Supreme Court Rules 13.1 and 13.3.

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CONSTITUTIONAL PROVISIONS INVOLVED

This case involves the Fourteenth Amendment of the United States Constitution involving the equal protection clause, which provides in relevant part: " . . . nor deny to any person within its jurisdiction the equal protection of the laws."

The statute at issue is 71 Pa.C.S.A. 5306(a)(a.1)(3) and related statutes. Attached and marked as Appendix D is the pertinent statutory language.

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STATEMENT OF THE CASE

The Petitioner, Judge James R. Kelley, a judge of the Pennsylvania Commonwealth Court, is seeking reversal of the Opinion of the Pennsylvania Supreme Court, which denied his constitutional challenge to the amendments of the Pennsylvania State Employees' Retirement Act (see 71 Pa.C.S.A. 5306(a)(a.1) and related statutes, Appendix D). The above statute denied Judge Kelley his right to apply for the enhanced pension benefits granted for prior state legislative service solely because he was a judicial officer. Judge Kelley alleged that the statute at issue violated the equal protection clause of the Fourteenth Amendment of the United States Constitution. He argued that the appropriate standard of review was that of strict scrutiny since the Pennsylvania statutes involved the legislative branch restricting the judicial branch and interfering with the independence of the judicial branch.

The Pennsylvania Supreme Court, in Appendix A, denied Judge Kelley's constitutional challenge to the State Employees' Retirement Act amendments both for his Class AA benefits and Class D-4 pension benefits. Judge Kelley was seeking to apply for the enhanced benefits for his 14.5250 years of service as a State Senator in Pennsylvania.

The pertinent factual and procedural history was stipulated to by the parties. James Kelley, who is currently a Senior Judge on the Commonwealth Court of Pennsylvania, was required to retire as an active Commonwealth Court Judge on December 31, 2001 due to his reaching the age of 70 (App. 53). Judge Kelley applied for his pension benefits of Class AA and Class D-4 with an effective date of January 1, 2002 (App. 53). Judge Kelley, because of the amendments to the Retirement for State Employees and Officers Act, sought to have his 14.5250 years of State service as a member of a Class A service when he was a Pennsylvania State Senator credited as either Class AA service or Class D-4 service for the purpose of the enhanced multiplier under the amendments to the

State Employees' Retirement Act (App. 52, App. 53, 71 Pa.C.S.A. 5306, Appendix D). The State Employees' Retirement Board denied Judge Kelley's request for the enhanced benefits, claiming he could not receive Class AA or Class D-4 service credit for his service as a State Senator because he was a judicial officer at the time of the effective date of the amendments to Act 9 (App. 11, App. 21, App. 70, App. 77). The Pennsylvania State Employees' Retirement Board took the position that the categories of Class D-4 or Class AA that were created under the new amendments to the Pension Act did not apply to Judge Kelley, who as a judge was in an E-1 category and not a Member of the General Assembly as of July of 2001.

The case began by the letter of James Kelley dated October 26, 2001 to Joseph Marcucci of the Pennsylvania State Employees' Retirement Board requesting information as to his right to the enhanced pension benefits and asking if he would be entitled to the multipliers under the new amendments (App. 69). By letter dated December 17, 2001, the State Employees' Retirement Board denied Judge Kelley his Class AA and/or Class D-4 benefits (App. 70 – App. 73). The letter was signed by John Brosius, Executive Director of the State Employees' Retirement System (App. 73). The letter noted as follows:

> "In summary, as a Class E-1 member of the judiciary on June 30 and July 1, 2001, you are not eligible to receive Class AA or Class D-4 service for your Class A state service performed prior to becoming a judge.

> You may appeal this decision within thirty days of the date of this letter . . . " (App. 73).

At that point, James Kelley retained present counsel, Samuel C. Stretton, Esquire, who sent a letter dated December 27, 2001 appealing the decision of the State Employees' Retirement Board (App. 74). The letter specifically noted as follows:

> "By this letter, Judge Kelley is appealing the decision to deny him the right to receive Class AA or Class D-4 pension benefits under Act 2001-9 for his service as a State Senator . . . " (App. 74).

By letter dated February 1, 2002, the State Employees' Retirement Board, through its Appeal Committee, denied James Kelley's request to elect Class AA or Class D-4 benefits (App. 81).

By letter dated February 20, 2002, Judge Kelley then appealed the adverse decision of February 1, 2002 (App. 77 – App. 80).

A hearing was scheduled before Hearing Examiner Michael Bangs of the State Employees' Retirement Board. In lieu of a hearing the parties reached a Stipulation of Facts and Exhibits (App. 52 – App. 68). Briefs were then filed with the Hearing Examiner by both the Petitioner (Judge Kelley) and Respondent (State Employees' Retirement Board) in support of their respective positions.

Subsequently the Hearing Examiner issued his opinion denying Judge Kelley the Class AA and Class

D-4 benefits on or about September 14, 2004 (App. 22, Appendix C). Timely Exceptions were filed by Judge Kelley to the Hearing Examiner's Report.

By Order and Opinion dated April 7, 2005, the State Employees' Retirement Board denied Judge Kelley's Exceptions and affirmed the decision of Hearing Examiner Bangs (App. 11 – App. 21, see Appendix C). On or about April 25, 2005, James Kelley through his counsel, Samuel C. Stretton, Esquire, filed a timely Petition for Review of the adverse determination of the State Employees' Retirement Board to the Commonwealth Court of Pennsylvania.

Oral argument was held before the en banc Commonwealth Court on December 14, 2005. Subsequently, by Opinion dated January 24, 2006, the Commonwealth Court granted Judge Kelley's request for Class AA pension benefits, but denied his request for Class D-4 benefits (see Appendix B). The case was published as *Kelley v. State Employees' Retirement Board*, 890 A.2d 1173 (Pa. Comm., 2006).

Judge Kelley, through present counsel, Samuel C. Stretton, filed a timely Petition for Allowance of Appeal to the Pennsylvania Supreme Court on the issue of the denial of the Class D-4 benefits. The Appellee/Cross-Appellant, State Employees' Retirement Board, also filed a timely Petition for Allowance of Appeal to the Pennsylvania Supreme Court on the issue of the grant of the Class AA benefits to Judge Kelley.

By Order dated November 27, 2006, the Pennsylvania Supreme Court granted both Petitions for Allowance of Appeal and also instructed both parties to brief the issue of whether Judge Kelley's request to convert Class A service to Class D-4 service was timely made. Justice Saylor recused himself from participation.

Timely briefs were filed with the Pennsylvania Supreme Court. The case was argued before the Pennsylvania Supreme Court on May 16, 2007. Subsequently, by Opinion dated September 26, 2007, the Pennsylvania Supreme Court affirmed the Commonwealth Court in denying the D-4 enhancement and reversed the Commonwealth Court, and denied Judge Kelley Class AA benefits (see Appendix A). The Pennsylvania Supreme Court did not utilize the strict scrutiny standard in evaluating the Class AA equal protection argument.

The underlying facts, which are contained in the Stipulation of Facts, are essentially undisputed (App. 52). Judge Kelley was born on May 31, 1931 (Stipulation No. 2, App. 52). Judge Kelley was elected to the Pennsylvania State Senate on May 22, 1974 and as a result became an active member in the Retirement System of Pennsylvania (Stipulation Nos. 4 & 5, App. 52). Judge Kelley was re-elected for three terms as a Pennsylvania State Senator and continued to serve as a Pennsylvania State Senator until November 30, 1988 (Stipulation No. 5, App. 52). As a State Senator James Kelley was credited with 14.5250 years of service as a member of Class A (Stipulation No. 6, App. 52).

James Kelley then was elected and served as an active judge on the Commonwealth Court of Pennsylvania from June 21, 1990 until December 31, 2001 (Stipulation No. 9, App. 52). Judge Kelley has continued to serve as a senior member of the Commonwealth Court since his active service concluded (Stipulation No. 13, App. 53). As a judge on the Commonwealth Court Judge Kelley was credited with 11.5278 years of service as a Commonwealth Court judge (Stipulation No. 10, App. 52). James Kelley's service originally was as a Class A member (Stipulation No. 11, App. 53). After the Pennsylvania Supreme Court decision in *Goodheart v. Casey*, 555 A.2d 1210 (Pa., 1989), James Kelley elected to become a Class E-1 member and a member of the SSI program for his judicial service (Stipulation No. 12, App. 53).

James Kelley applied for the new enhancement benefits with an effective date of January 1, 2002 (Stipulation No. 14, App. 53).

There was a further stipulation that the Pennsylvania General Assembly enacted amendments to the State Employment Act found at 71 Pa.C.S.A. 5101 to create two new classes of state services, Class AA and Class D-4 with new multipliers (Stipulation No. 20, App. 54). The stipulation was that Judge Kelley sought to have his annuity for his state services credited as either Class AA service or Class D-4 service (Stipulation No. 21, App. 54, see 71 Pa.C.S.A. 5306, Appendix D). The State Retirement Board took the position that the new Act did not permit a sitting judge to convert his Class A service to Class AA or Class D-4 service (Stipulation No. 22, App. 54).

The stipulation further indicated that if James Kelley was successful in getting Class AA credit for his years in the Pennsylvania State Senate, his monthly maximum single life annuity would be $9,156.00 with a present value of $1,123,020.00 (Stipulation No. 24, App. 54). It was further stipulated if James Kelley received Class D-4 benefits, his maximum single life annuity would be $9,919.00 and his actual monthly benefits would be $6,399.00 per month (Stipulation No. 25, App. 55).

There were further stipulations of the number of judges who would be affected by James Kelley's litigation if he was successful (Stipulation No. 34, App. 56, App. 57). The total amount of money to be paid to judges, if Judge Kelley was successful, was approximately $2,500,000.00, a small percentage of the total amount of the Pension Act Amendments (see stipulation 35 and 36) (App. 56, App. 57).

The stipulation set forth the timely appeals James Kelley made for the Class AA and Class D-4 benefits (Stipulation Nos. 35-40, App. 57). The said stipulations reflect that James Kelley timely requested and asked for Class AA and/or Class D-4 benefits (App. 57).

Judge Kelley is seeking review of the decision of the Pennsylvania Supreme Court, which upheld the constitutionality of 71 Pa.C.S.A. 5306(a)(a.1)(3), Appendix D), and which denied Judge Kelley the enhanced Class AA benefits for his prior state senate service. Judge Kelley respectfully contends that the

Pennsylvania Supreme Court erred in not finding the appropriate Pennsylvania Statutes (71 Pa.C.S.A. 5306) to be unconstitutional and in violation of the equal protection clause and, further, the Pennsylvania Supreme Court used the wrong standard of review and a strict scrutiny standard should have been utilized.

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REASONS FOR GRANTING THE WRIT

Does the legislative enactment excluding the judiciary require strict scrutiny in its review pursuant to an equal protection challenge? Was Pennsylvania Commonwealth Court Judge Kelley unfairly denied the right to elect Class AA pension benefits enhancement for his fourteen and a half years of prior service as a Pennsylvania State Senator when the Amendments to the Pennsylvania Employees' Retirement Act [71 Pa.C.S.A. 5306(a)(a.1)(3)] created an arbitrary and unconstitutional prohibition that excluded judicial officers, yet allowed most other legislators and state employees to have enhancements for their prior legislative service? Did this arbitrary exclusion of judicial officers violate the equal protection clause of the United States Constitution, and was the appropriate standard of review due to the interference and infringement of the legislative branch of government with the judicial branch and judicial independence that of strict scrutiny?

Judge Kelley respectfully contends the Pennsylvania Supreme Court erred in denying him Class AA benefits and in not finding that Pennsylvania Statute 71 Pa.C.S.A. 5306(a)(a.1)(3), and related provisions to be in violation of the equal protection clause of the United States Constitution. Judge Kelley contends that he was denied his enhanced benefits for Class AA enhancement for his fourteen and a half years of service as a Pennsylvania State Legislator, while his other colleagues in the State Senate, who had served even less time, would be eligible for these benefits without any additional contributions. The only reason he was being denied was solely because he was an active member of the Pennsylvania State Judiciary.

Judge Kelley contends the Pennsylvania Supreme Court used the wrong standard of review by utilizing a rational basis standard. He contends that a strict scrutiny standard was the correct standard of review. Judge Kelley contends the Statute 71 Pa.C.S.A. 5306(a)(a.1)(3) created an arbitrary classification, which discriminated against him because of his judicial status and denied him his appropriate enhancement for his prior legislative services while other Legislators who served with Judge Kelley in the State Legislature were eligible to elect to receive these enhanced benefits since they were not an active member of the judiciary at the time of the election.

Judge Kelley contends that this case requires a strict scrutiny analysis since it involved the interference with the judicial branch and judicial independence by a separate branch of government, the Pennsylvania State Legislature.

The Pennsylvania Retirement Act for state employees was amended effective July 1, 2001. (71 Pa.C.S.A. 5301, et al.) Judge Kelley sought to take advantage of the enhanced benefits pursuant to the Class AA multiplier increase under the new Act for his non-judicial service as a state senator for the 14.5250 years of State Senate service as a Class A member.

The applicable statutes at issue are as follows: The first is 71 Pa.C.S.A. 5306(a)(a.1), which allows for election for prior legislative service as a Class AA member with the exception for employees who are classified as Class E-1 members. Class E-1 is a member of the judiciary. Judge Kelley was an active member of the judiciary as of July 1, 2001. As a result, Judge Kelley was not eligible to take advantage of the election to become a Class AA member under 71 Pa.C.S.A. 5306(a)(a.1)(3). As a result, he was not able to receive the enhanced benefits as set forth in 71 Pa.C.S.A. 5708.7(g)(3), et al., until the Pennsylvania Commonwealth Court found his exclusion to be in violation of the Equal Protection Clause (see Appendix B). The Pennsylvania Supreme Court then reversed the decision of Pennsylvania Commonwealth Court involving Class AA benefits.

Judge Kelley has been precluded from having the multiplier enhancement for his fourteen plus years as a Pennsylvania State senator because active members of the judiciary were specifically excluded from the provisions allowing for such election to Class AA (71 Pa.C.S.A. 5301, 71 Pa.C.S.A. 5306, Appendix D).

Members of the judiciary were not within the class allowed to elect the multipliers in the Class AA category. Judge Kelley is in Class E-1, which class was excluded from participation in the new enhanced benefits solely because of his judicial status.

The arbitrariness of this classification is clearly seen by looking at the other persons who were able to elect the enhancement. For instance, a former member of the General Assembly who was elected judge and took office after the effective date of this act would be entitled to have the enhanced Class AA benefits for his or her prior legislative service. Similarly, a judicial officer who had previously served as a state employee would again be denied the privilege of these enhanced Class AA benefits if he or she was an active judge at the time of the adoption of these amendments and not a state employee.

Judge Kelley was in a position where colleagues of his in the state house or state senate who had less legislative time than he, were able to elect these enhanced benefits while Judge Kelley could not because he was an active member of the judiciary. The fact Judge Kelley was an active judge should not in any way create an arbitrary category where he could not benefit from enhancements that go directly to his prior legislative services when his fellow legislators can so elect the enhancement without additional contributions.

As a result, Judge Kelley was denied a substantial increase in his benefits and he was not able to have the legislative time credited and factored at the 2.5% multiplier as other non-judicial public officials were able to do when electing Class AA benefits. Because Judge Kelley served in the judicial branch, his multiplier for his legislative time remains fixed at the multiplier of 2. The multiplier would enhance his benefits by 25 percent under Class AA. As noted from the Stipulation of Facts (App. 52), Judge Kelley lost significant benefits as a result of this arbitrary distinction. If Judge Kelley were allowed to receive the Class AA service, his monthly maximum single life annuity would be approximately $9,156 with a present value of $1,123,020. (See Stipulation No. 24, App. 54) This is a significant increase over what he was currently receiving. (Stipulation Numbers 18, 19, App. 53, App. 54).

The Commonwealth Court, utilizing the rational basis standard, agreed with Judge Kelley and found the Equal Protection Clause was implicated by the denial of the Class AA benefits (see Appendix B). Although agreeing with the Commonwealth Court's decision, Judge Kelley argued to the Pennsylvania Supreme Court the Commonwealth Court should have used the strict scrutiny standard in applying the equal protection violation. The Pennsylvania Supreme Court in its opinion reversed the Commonwealth Court, and further, did not utilize a strict scrutiny analysis.

In essence, Judge Kelley is complaining the statute prohibits him from benefiting from the multiplier of Class AA for his prior legislative service solely because he was an elected active judge. This new Pension Act amendment in essence penalizes a judicial officer for his or her prior non-judicial legislative or other state service. These benefits are not for judicial service but for Judge Kelley's prior legislative service, yet this unfair and discriminatory category excludes all active judges at the time of the passage of the amendments, who had prior state service. This was an extremely unfair category that discriminates based on employment and represented an intrusion by the legislative branch into the judicial branch. There is no rational basis for this. But, clearly the application of strict scrutiny standard would conclude the statute violated the equal protection clause of the United States Constitution. Judge Kelley contends this statutory exclusion is purely an arbitrary time based classification prohibiting him from the enhancements for his prior legislative service that has no rational basis and which could not withstand a strict scrutiny analysis. This appeal has nothing to do with adequacy of compensation. This appeal has to do with the legitimacy of the classification where a judicial officer is being treated differently for his or her prior legislative services than other members of the legislature. This point was ignored by the Hearing Examiner and the Retirement Board. The Commonwealth Court agreed with Judge Kelley. The Pennsylvania Supreme Court reversed and did not utilize a strict scrutiny standard of review in evaluating the equal protection argument.

Judge Kelley contends that the appropriate standard of review, which the Pennsylvania Supreme Court did not utilize in his equal protection argument, is that of strict scrutiny. In an earlier decision, the Pennsylvania Supreme Court, in a plurality opinion of *Klein v. Employees' Retirement System*, 555 A.2d 1216 (Pa., 1989), held that the classification of a two-tiered judicial retirement system violated the equal protection clause of the Pennsylvania Constitution. Three justices found that a strict scrutiny standard would be applicable. *Id.* 1224. The Pennsylvania Supreme Court, in the plurality decision, found that a strict scrutiny standard would be applicable since it involved actions by the legislative branch in restricting the judicial branch for judges who were elected and serving before 1974. The Pennsylvania Supreme Court, in *Klein*, noted as follows in utilizing the strict scrutiny approach:

> "In the instant case, we find the interest or right affected by the classification at issue to be fundamental requiring strict scrutiny by this Court. As we have previously noted, our tripartite system requires the courts to recognize and where appropriate, exercise their authority as a co-equal, independent branch of government to protect that independence from legislative usurpation." *Id.* 1224.
>
> " . . . by the two-tiered retirement compensation plan, it must be strictly scrutinized to determine if the classification has been narrowly tailored and is necessary to

> achieve a compelling state interest. We hold that such a classification cannot survive such strict scrutiny; indeed there is not even a rational basis for the arbitrary time based classification, let alone a compelling state interest." *Id.* 1225.

The Pennsylvania Supreme Court, in *Klein*, appeared concerned by the Legislature's interference with the judicial branch. This standard was rejected in the current case by the Pennsylvania Supreme Court and this is the basis for Judge Kelley seeking Petition for Writ of Certiorari with this Honorable Court.

In the Federalist Papers, Alexander Hamilton noted as follows:

> "The legislature now commands the purse, but prescribes the rules by which the rights of every citizen are to be regulated. The judiciary, on the contrary, has no influence over either the sword or the purse . . . This simple view of the matter suggests important consequences; it proves incontestably that the judiciary is by comparison, the weakest of the three departments of power; it can never attack with success either of the other two; and all possible care is requisite to enable it to defend itself of their attacks." *Federalist Papers, LXXVIII*, Alexander Hamilton (P. 425).

The concept of judicial independence and the need to protect the judiciary from interference by the other branches of government was clearly recognized by the founding fathers.

> "But it is easy to see, that it would require an uncommon portion of fortitude in the judges to do their duty as faithful guardians of the constitution, where legislative invasions of it have been instigated by the major voice of the community. But, it is not with a view to infractions of the constitution only, that the independence of the judges may be an essential safeguard against the effects of occasional ill humors in the society. These sometimes extend no further than to the injury of the private rights of particular classes of citizens, by unjust and partial laws." *Federalist Papers LXXVIII*, Alexander Hamilton (P. 429).

The concept of separation of powers creates a fundamental right requiring the strict scrutiny of a legislative classification where the classification impermissibly interferes with the exercise of a fundamental right. The Pennsylvania Legislature by arbitrarily prohibiting a judicial officer, solely because he or she is a judicial officer, from receiving enhanced pension benefits for prior legislative services that others, not judges, could receive, implicates a fundamental right, i.e., the separation of powers doctrine and the need for judicial independence.

The Pennsylvania Supreme Court erred in not reviewing Pennsylvania Statute 71 Pa.C.S.A. 5306(a)(a.1)(3) and related provisions in an equal protection challenge by not utilizing the strict scrutiny analysis. The Pennsylvania Courts failed to recognize this statute by arbitrarily prohibiting judges from receiving benefits for prior service, which was available to others, implicated the fundamental right of judicial independence and the right of the judiciary to be free from legislative intrusion.

Judge Kelley contends that he should not be punished by the Pennsylvania State Legislature for his judicial employment, and denied the enhanced benefits for his prior legislative services. Judge Kelley contends that he should not be denied the enhanced benefits when non-legislative employees, who were former State Senators or State Representatives were eligible for the past benefits. He contends that this is an unfair interference with the judicial branch and judicial independence by the Pennsylvania State Legislature and warrants a strict scrutiny analysis.

Judge Kelley respectfully requests this Honorable Court grant his Petition for Writ of Certiorari for the reasons stated above and find that the aforementioned Pennsylvania Statutes are unconstitutional and in violation of the equal protection clause, and further find that the Pennsylvania Supreme Court erred in not using a strict scrutiny analysis.

CONCLUSION

The Petitioner, Judge James Kelley, by his counsel, Samuel C. Stretton, Esquire, respectfully requests this Honorable Court grant this Writ of Certiorari and review the decision of the Pennsylvania Supreme Court and find the Pennsylvania Supreme Court erred in not utilizing a strict scrutiny analysis and reverse the failure of the Pennsylvania Court to find the aforementioned Pennsylvania Statutes were unconstitutional.

Respectfully submitted,

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APPENDIX "A"

932 A.2d 61

Supreme Court of Pennsylvania.
James R. KELLEY, Appellant,
v.
STATE EMPLOYEES'
RETIREMENT BOARD, Appellee,
James R. Kelley, Appellee,
v.
State Employees' Retirement Board, Appellant.
Argued May 16, 2007.
Decided Sept. 26, 2007.

Samuel C. Stretton, Esq., West Chester, for James R. Kelley.

Nicholas Joseph Marcucci, Esq., PA State Employees' Retirement System, for State Employees' Retirement Board.

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Nicholas Joseph Marcucci, Esq., PA State Employees' Retirement System, for State Employees' Retirement Board.

Samuel C. Stretton, Esq., West Chester, for James R. Kelley.

BEFORE: CAPPY, C.J., and CASTILLE, SAYLOR, EAKIN, BAER, BALDWIN and FITZGERALD, JJ.

OPINION

Justice BALDWIN.

I. Factual and Procedural Background

On January 24, 2006, the Commonwealth Court reversed in part and affirmed in part the order of the State Employees' Retirement Board (SERB) and permitted James R. Kelley (Appellant) to convert his Class A membership status in the State Employees' Retirement System (SERS) to Class AA status while prohibiting him from converting his Class A membership status to Class D-4 status.[1] Appellant challenges the determination of the Commonwealth Court that he is ineligible for Class D-4 membership status. SERB is the cross-Appellant with respect to the Commonwealth Court's decision, challenging the determination that Appellant can convert his membership status to Class AA.

On May 22, 1974, Appellant became an active member of SERS when he took office as an elected member of the Pennsylvania General Assembly. During his service in the Senate, Appellant accrued retirement benefits as a Class A SERS member. *See* 71 Pa.C.S. § 5306. At the time he terminated his Senate service on November 30, 1988, Appellant had accrued 14.5250 years of state service as a Class A member. Although, by the end of his Senate service his pension rights had vested, Appellant did not withdraw his accumulated deductions and did not apply for an annuity. From June 21, 1990 to December 31, 2001, Appellant served as a judge of the Commonwealth Court of Pennsylvania, during which time he was credited with 11.5278 years of Class A service as an active SERS member. However, pursuant to *Goodheart v. Casey*, 521 Pa. 316, 555 A.2d 1210 (1989), Appellant elected to have his judicial service credited as Class E-1 rather than Class A.[2]

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[1] While referring to James R. Kelley as the Appellant, we acknowledge that he is the Appellee with respect to the cross-appeal filed by the State Employees' Retirement Board.

By the Act of May 17, 2001, P.L. 26, No 9 (hereinafter Act 9) the Legislature added two new classes of state service, Class AA and Class D-4, to the State Employees' Retirement Code (Retirement Code), *See* 71 Pa.C.S 5306.1 and 5306.2. On October 26, 2001, Appellant requested information from SERS regarding the eligibility of his Class A Senate service for inclusion in the two new classes of service established by Act 9. On December 17, 2001, SERS informed Appellant that the only class available to him for his Senate service was Class A. SERS further informed Appellant that Act 9 precluded him from converting his Class A Senate service to either Class AA or Class D-4 service.

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[2] The State Employees' Retirement Code of 1959 authorized judges to elect class E-1 coverage which permitted them to contribute a higher percentage of their salaries and receive proportionately higher benefits than allowed by Class A. *See* Former 71 P.S. 1725-301(1)(a) and 1725-401(1)(e). In 1974, the Retirement Code was amended, eliminating the option for judges to elect class E-1 coverage. We observed in *Goodheart* that judges who assumed office after the enactment of the 1974 Retirement Code received different retirement benefits than judges who assumed office prior to that date. Reasoning that this disparity in compensation was unconstitutional, we held that the post-1974 judges must be given the opportunity to pay into the system sufficient funds to permit the conversion of their retirement package into the same Class E-1 benefits received by the pre-1974 judges. *Goodheart*, 521 Pa. at 328, 555 A.2d at 1215-16.

Appellant sought review of the decision with the SERS Appeals Committee on December 27, 2001. Four days later, on December 31, 2001, Appellant reached the mandatory retirement age and his service as an active judge ended. On January 1, 2002, Appellant applied to SERS for an annuity, specifying that his application was subject to a reservation of his claim for Class AA or Class D-4 credit for his Senate service. SERS calculated that Appellant was entitled to an annuity based upon 14.5250 years of Class A service and 11.5278 years of Class E-1 service. On February 1, 2002, SERS informed Appellant that the Appeals Committee had denied his request to convert his Class A service as a Senator to Class AA or Class D-4 service. Thereafter, Appellant filed a timely appeal seeking to have his 14.5250 years of Senate service credited as either Class AA service or Class D-4 service, contending that the Act 9 amendments denied him equal protection of the laws in that they impermissibly granted unequal pension benefits to members of the General Assembly, and that they unconstitutionally impaired his contract for pension benefits.

In lieu of a hearing, the parties submitted Stipulations and Exhibits to a Hearing Examiner who found, based on the stipulations that a Class A member would accrue benefits at a rate of 2 for each year of service while Class AA and Class D-4 members' service would be credited at a 2.5 and 3 benefit accrual rate respectively, for each year of service. The Hearing Officer determined that Appellant's total guaranteed annuity payment at the time of his retirement amounted to $843,567.67. If Appellant succeeded on his claim for Class AA membership, his total annuity payment would increase to approximately $923,536. If Appellant's claim for Class D-4 membership was successful, his total annuity payment would amount to approximately $1,009,922.[3]

The Hearing Examiner ruled that Appellant's application for Class D-4 membership was time barred, noting that 71 Pa.C.S. 5306.2(a) specified that applications for Class D-4 membership must be made in writing to SERS by June 30, 2001. Because he first pursued membership in Class D-4 on October 26,

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[3] The Hearing Examiner noted that election of class AA required an increase in contributions in order to obtain the higher contributions associated with Class AA membership. The basic contribution rate is 5. 71 Pa.C.S. 5102. Act 9 required Class AA members to contribute 6.25 of their retirement-covered compensation paid on after January 1, 2002, and 5 of compensation paid before that date. Class D-4 members were required to pay 7.5 of their retirement-covered compensation paid after June 30, 2001, and 5 before that date. *See Kelley v. SERB*, No.2002-02, slip op. of Hr'g Exam'r at 25, n. 2 (SERB April 16, 2004) (Hearing Examiner op.).

2001, almost four months after the election period had expired, the Hearing Examiner concluded that his election for Class D-4 membership was untimely, and dismissed Appellant's claim.

The Hearing Examiner then reasoned that the unambiguous language of section 5306(a.1)(3) plainly provided that to qualify for Class AA membership Appellant needed to be a Class A member on June 30 and July 1, 2001. Because he had elected Class E-1 membership, the Hearing Examiner determined that on the critical dates of June 30 and July 1, 2001, he was not a Class A member and was therefore ineligible for Class AA membership status.[4] The Hearing Examiner further found no merit to Appellant's argument that the Act 9 amendments are unconstitutional, concluding that the amendments neither violated Appellant's equal protection rights nor impaired his contract for pension benefits.

Appellant filed exceptions with SERB from the Hearing Examiner's conclusions. SERB agreed with the Hearing Examiner that Appellant failed make a timely election for D-4 membership by filing written notice with SERB before July 1, 2001, and denied Appellant's request to convert his Class A membership to Class D-4. SERB further agreed with the

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[4] The Hearing Examiner noted that Section 5306(a.2)(1) and (2) would similarly have disallowed Appellant's claim for Class D-4 membership, had it been timely, since in order to qualify for Class D-4 membership, Appellant needed to have been a member of the General Assembly after June 30, 2001.

Hearing Examiner that Appellant failed to demonstrate that his equal protection rights were violated or that the Act 9 amendments unconstitutionally diminished his compensation and impaired his contractual rights. SERB additionally agreed that Appellant was ineligible for Class AA membership and that his exclusion from Class AA was not constitutionally impermissible.

Thereafter, Appellant sought review with the Commonwealth Court. A divided five member panel reversed SERB's order to the extent that it denied Appellant's request to convert his Class A service to Class AA service and affirmed SERB's decision to deny Appellant's request to convert his Class A service to Class D-4 service.

Employing a rational basis test to ascertain whether the Act 9 classifications passed constitutional muster, the court determined that the Legislature's objective in passing Act 9 was to rectify the fact that over the previous two decades, the pension funds had experienced higher-than-expected rates of return, and that the amendments were intended to permit employees to share in those higher-than-expected returns on their contributions.[5]

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[5] Act 9, Section 1(2) provides:

> **Over the past two decades, both pension funds have experienced investment returns well in excess of expectations.** As a result, State and school district contributions have decreased dramatically to

(Continued on following page)

In determining whether the Legislature's exclusion of Appellant from membership in Class AA was rationally related to the state purpose of permitting employees to share in the higher-than-expected returns on their contributions, the Commonwealth Court agreed with Appellant that SERB violated his equal protection rights in precluding him from converting his Class A service to Class AA. The Commonwealth Court

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> less than 1 of payroll for next year. At the same time, employee contributions range from 5 to 6.25 of payroll. The outstanding investment performance has resulted in the pension funds being over 123 funded, compared to current needs. The 4 statutory interest rate the employees receive on their pension accounts has consistently been eclipsed by the actual average returns of the funds over the last two decades and also has been less than available private market interest rates. The fact that employees have been and are projected to continue to contribute at a rate that is materially greater than the employers due to the more than 100 funded status of the plans raises the issue of the extent to which employees should be provided additional benefits. **The increase in benefits for State and school employees provided herein will in effect allow them for the first time to share in the outstanding investment performance of the funds.** To date, that experience has only benefited the employers through reduced contributions to the funds. Even with the increases in benefits provided herein, both pension funds are projected to maintain minimal employer contribution rates and at the same time maintain a fully funded status. For at least the next decade, members are projected to continue to contribute at a rate substantially in excess of that required from the employers.

Act of May 17, 2001, P.L. 26 (emphasis added).

reasoned that sections 5306.1(b) and (c) of the Retirement Code specified that election to become a Class AA member must be made before January 1, 2002, but that membership in Class AA would become effective on the later of July 1, 2001 or the date on which the election was filed. Since Act 9 only required Class AA members to contribute at the increased rate beginning on January 1, 2002, if an employee elected Class AA membership and retired before January 1 2002, such an employee would be able to receive the enhanced benefits of Class AA service without ever making the increased employee contributions. The Commonwealth Court determined that Appellant was similarly situated with these individuals since he had been a Class A member, he had sought Class AA membership, and he had retired before January 1, 2002. Therefore, the court reasoned that Appellant was entitled to receive Class AA status for his years of Senate service, even without making the higher Class AA contributions on that service.

By precluding Appellant from sharing in the higher returns as a Class AA member, the court reasoned that Act 9 essentially gave Appellant's higher returns on his money to other state employees. Since this result was not rationally related to the objective of Act 9, the court held that the exclusion of Appellant from Class AA violated Appellant's equal protection rights.

With respect to Appellant's application for Class D-4 membership, the Commonwealth Court majority reasoned that SERB erred in concluding that Appellant's request to convert his Class A service to Class D-4 service was untimely. The court observed that section 5306.2(a) which specified that members of the General Assembly were required to elect Class D-4 membership before July 1, 2001, became effective on May 17, 2001. Because Appellant was not a member of the General Assembly between May 17, 2001 and July 1, 2001, the Commonwealth Court determined that section 5306.2(a) was inapplicable to Appellant and could not be relied upon to find his application untimely.

The Commonwealth Court additionally reasoned that in finding that Appellant's request for Class D-4 service failed to meet the section 5306.2(a) timeliness requirements, SERB overlooked the fact that Appellant's equal protection argument extended to a challenge of the constitutionality of section 5306.2(a), since section 5306.2(a) limited the election of Class D-4 membership to members of the General Assembly. Therefore, the court determined the question of timeliness could not be resolved absent an analysis of whether Act 9 unconstitutionally excluded him from Class D-4 membership.

The court then reviewed Appellant's argument that the Act 9 amendments unconstitutionally precluded him from Class D-4 membership and determined that SERB neither violated Appellant's equal protection rights nor impaired his contractual obligations in barring him from Class D-4. The court noted that section 5306.2(a) required eligible state employees to elect Class D-4 by July 1, 2001, with membership in Class D-4 becoming effective on that date. Consequently, the court reasoned there was no period of time during which Class D-4 members with prior Class A status could retire and share in the higher Class D-4 returns without paying the increased contributions associated with Class D-4 membership. Appellant however, if permitted to elect Class D-4 membership, would be able to receive the increased benefits associated with Class D-4 without having to make the required increased contributions. Concluding that section 5306.2(a) did not discriminate between like persons in like circumstances, the court determined that Appellant's equal protection argument lacked merit.

The Commonwealth Court also concluded that the Act 9 amendments did not impair Appellant's contractual obligations. The Commonwealth Court reasoned that the relevant contract between the Commonwealth and Appellant was the 1974 Retirement Code which provided Appellant with Class A retirement benefits for his years of Senate service. Because the Act 9 amendments did not modify that contract to Appellant's detriment, the Commonwealth Court found no merit to Appellant's arguments that his contractual obligations were impaired.

II. Standard of Review

Appellant asserts that Act 9 violates his right to equal protection of the laws by excluding him from Class AA and D-4 membership. In *Curtis v. Kline*, 542 Pa. 249, 666 A.2d 265, (1995), we set forth the following with respect to equal protection:

> The essence of the constitutional principle of equal protection under the law is that like persons in like circumstances will be treated similarly. However, it does not require that all persons under all circumstances enjoy identical protection under the law. The right to equal protection under the law does not absolutely prohibit the Commonwealth from classifying individuals for the purpose of receiving different treatment, and does not require equal treatment of people having different needs. The prohibition against treating people differently under the law does not preclude the Commonwealth from resorting to legislative classifications, provided that those classifications are reasonable rather than arbitrary and bear a reasonable relationship to the object of the legislation. In other words, a classification must rest upon some ground of difference which justifies the classification and have a fair and substantial relationship to the object of the legislation.

Curtis, 542 Pa. at 255, 666 A.2d at 268 (citations omitted).

The legal framework for evaluating an equal protection challenge to a particular statutory classification consists of three different types of classifications, each of which calls for its own standard of review. We have described this framework as follows:

> The types of classifications are: (1) classifications which implicate a "suspect" class or a fundamental right; (2) classifications implicating an "important" though not fundamental right or a "sensitive" classification; and (3) classifications which involve none of these. Should the statutory classification in question fall into the first category, the statute is strictly construed in light of a "compelling" governmental purpose; if the classification falls into the second category, a heightened standard of scrutiny is applied to an "important" governmental purpose; and if the statutory scheme falls into the third category, the statute is upheld if there is any rational basis for the classification.

Probst v. Com., Dept. of Transp., 578 Pa. 42, 56, 849 A.2d 1135, 1144 (2004). Appellant, relying on *Klein v. SERS*, 521 Pa. 330, 555 A.2d 1216 (1989), argues that Act 9 infringes upon the fundamental right of judges to be independent and therefore a strict scrutiny analysis must be employed to determine whether Act 9 violates his equal protection rights. In *Klein*, where the legislation at issue granted some judges greater retirement benefits than others, we utilized a strict scrutiny approach to hold that the classification among judges violated the equal protection clause.

We determined in *Klein* that legislation which provided disparate retirement compensation benefits for judges of the same level or court performing the same duties and exercising the same authority, compromised the constitutional mandate for a unified judicial system and threatened the fundamental interest in the independence and integrity of the judiciary. The analysis in *Klein* which concerns unequal compensation among judges, differs from the instant case which concerns disparate compensation benefits between judges and legislators. Furthermore, *Klein* is a plurality decision of this court and as such, does not constitute binding precedent. *See In Interest of O.A.*, 552 Pa. 666, 676, 717 A.2d 490, 496, n. 4. (1998) ("While the ultimate order of a plurality opinion; i.e. an affirmance or reversal, is binding on the parties in that particular case, legal conclusions and/or reasoning employed by a plurality certainly do not constitute binding authority.")

While we stated in *Klein* that "elected public officials similarly situated cannot be paid different compensation when they perform the same functions and exercise the same authority," that determination, has never, in the context of compensation for elected officials, been adopted by a majority of this court. *Klein*, 521 Pa. at 349, 555 A.2d at 1226; *Harper v. SERS*, 538 Pa. 520, 524, 649 A.2d 643, 645 (1994). "[T]he accepted test is whether or not there is a rational basis for [the] classification, unless the classification affects a suspect group or impinges on a fundamental right." *Harper*, 538 Pa. at 524-25, 649

A.2d at 645. Because the legislation at issue in the case at bar, as in *Harper*, does not affect a suspect group or impinge upon a fundamental right, the appropriate test is whether a rational basis for the classifications exists.

In applying the rational basis test, this Court employs a two-step analysis. First, we determine whether the challenged statute seeks to promote any legitimate state interest or public value. If so, we then determine whether the legislative classification is reasonably related to accomplishing that articulated state interest. *Kramer v. W.C.A.B. (Rite Aid Corp.)*, 584 Pa. 309, 335, 883 A.2d 518, 534 (2005). The classification need only be directed at the accomplishment of a legitimate governmental interest in a manner which is not arbitrary or unreasonable. *Kramer,* 584 Pa. at 333, 883 A.2d at 532.

In the instant case, the Commonwealth Court concluded that the stated purpose of Act 9, as set forth in section 1(2) of the Act, is to permit employees to share in higher-than expected returns on their contributions over the past twenty years.[6] While section 1(2) articulates the overall reason for the passage of Act 9, it does not specifically articulate a reason for the Class AA and Class D-4 limitations on membership. We have held however that under a rational basis analysis, "[t]he courts are . . . free to hypothesize reasons why the Legislature created the particular classification at issue and, if some legitimate reason exists, the provision cannot be struck down, even if its soundness or wisdom might be deemed questionable." *Kramer*, 584 Pa. at 335, 883 A.2d at 534.

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[6] *See* note 4.

III. Class AA

In the case at bar, SERB excluded Appellant from Class AA membership in accordance with 71 Pa.C.S. 5306(a.1) which reads, in pertinent part, as follows:

> (a.1) Class AA membership.
>
> (3) Provided that an election to become a Class AA member is made pursuant to section 5306.1 (relating to election to become a Class AA member), a State employee, other than a State employee who is a State police officer on or after July 1, 1989, who on June 30, 2001, and July 1, 2001, is:
>
> (i) a member of Class A, other than a member of Class A who could have elected membership in a Class C, Class D-3, Class E-1 or Class E-2;
>
> . . .
>
> shall be classified as a Class AA member and receive credit for Class AA State service performed after June 30, 2001, upon payment of regular member contributions for Class AA service and . . . shall receive Class AA service credit for all Class A State service, other than State service performed as a State police

> officer or as a State employee in a position for which the member could have elected membership in Class C, Class D-3, Class E-1 or Class E-2, performed before July 1, 2001.
>
> . . .
>
> We agree with SERB that in order to elect Class AA membership, section 5306(a.1) required Appellant to be a member of Class A on June 30 and July 1, 2001. That section excluded from Class AA membership those Class A members who could have elected, *inter alia*, membership in Class E-1.[7] On the specified dates of June 30 and July 1, 2001, Appellant had elected to become a Class E-1 member, pursuant to our decision in *Goodheart*, and had made the required contributions to have all of his service as an active judge on the Commonwealth Court credited as Class E-1. The requirements of section 5306(a.1) rendered Appellant ineligible for Class AA membership by virtue of his election of Class E-1 status.

Appellant asserts that section 5306(a.1) violates the requirements of equal protection in that it unconstitutionally excludes him, as a Class E-1 member with prior legislative service, from electing Class AA membership. In reviewing Appellant's equal protection argument to determine whether the classification was rationally related to a legitimate government interest, the Hearing Examiner observed, and SERB, agreed that membership in Class E-1 permitted Appellant to acquire benefits in excess of those received by Class A members. *See* Hearing Examiner op. at 25; *Kelley v. SERB*, No.2002-02, slip op. of State Employees' Retirement Bd. at 8 (SERB April 7, 2005) (SERB op.). Since Act 9 was also intended to offer enhanced benefits to certain state employees, we agree that the exclusion of Class E-1 members, who were already entitled to separate benefit enhancements, constitutes a classification with a rational basis. The Legislature may rationally intend to restrict state employees who already enjoyed separate categories of increased benefits from Class AA benefits. Because the Class AA restriction on membership was rationally related to the legitimate state purpose of limiting enhanced benefits to certain Class A members who were not included in the other categories offering enhanced benefits, the Legislature's exclusion of Class E-1 members from electing Class AA membership is not constitutionally infirm.

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[7] 71 Pa.C.S. § 5306(a.1) also excludes members of Class C, Class D-3 and Class E-2. The Hearing Examiner observed that members of these "special classes" are entitled to receive enhanced benefits in excess of those of the rank and file Class A members. Hearing Examiner op. at 25.

SERB additionally determined that the estimates of SERS's consulting actuaries, as set forth in the parties' stipulations, demonstrated that if Appellant succeeded on his claim, the Retirement System would incur significant costs. Section 1(2) of Act 9 specifies that even with the increases in benefits provided by the new classifications, the pension funds are projected to maintain a fully funded status. It is rational to predict that if the Act 9 membership classes were expanded as Appellant requests, the "fully funded" status of the employee pension funds could be compromised. Therefore, in setting limitations on the election of Class AA membership, the General Assembly may have legitimately concluded that an extension of Class AA membership to include Class E-1 employees would have an adverse economic impact on SERS' limited resources.

Appellant asserts that financial expediency does not justify an otherwise arbitrary classification. However, based on the above discussion, the classification is not arbitrary. In addition, where the distribution of economic benefits is involved, the General Assembly is free to create classifications so long as those classifications do not discriminate against suspect classes and they bear some rational relationship to legitimate state purposes. *Martin v. Unemployment Comp.Bd. of Review*, 502 Pa. 282, 291, 466 A.2d 107, 111 (1983). "The state's duty to maintain the fiscal integrity of the retirement fund through actuarial soundness is a valid basis for some changes in a retirement system." *Ass'n of Pa. State Coll. and Univ. Faculties v. State Sys. of Higher Ed.*, 505 Pa. 369, 377, 479 A.2d 962, 966 (1984).[8] Although the

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[8] Appellant again relies on the opinion in support of affirmance in *Klein* to support his contention that fiscal soundness cannot be achieved at the expense of individuals such as himself.

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precise financial impact that SERS would sustain if Appellant succeeded on his claims is not enumerated in the record, we specified in *Martin* that the Legislature need not justify its logical presumptions with statistical evidence, and the courts do not require record evidence to justify a classification. *Martin,* 502 Pa. at 292, 466 A.2d at 111-12. "Economic legislation is valid unless the varying treatment of different groups or persons is so unrelated to the achievement of any combination of legitimate purposes that a court can only conclude that the Legislature's actions were irrational." *Martin,* 502 Pa. at 295, 466 A.2d at 113. This is a heavy burden that Appellant has failed to carry.

While section 5306(a.1)(3) may have created an inequity in precluding Appellant from receiving Class AA credit for his past legislative service, equal protection does not prohibit the Commonwealth from resorting to legislative classifications, provided that those classifications are reasonable rather than arbitrary and bear a reasonable relationship to the object of the legislation. Appellant chose to become a Class E-1 member. Classifications are permissible

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We reiterate that the equal protection analysis in *Klein* has never, in the context of compensation for elected officials, been adopted by a majority of this court. *See Harper*, 538 Pa. at 524, 649 A.2d at 645. Furthermore, *Klein* is distinguishable from the instant case. In *Klein*, fiscal integrity alone was determined to be insufficient to overcome the heightened strict scrutiny standard at issue there whereas the instant case calls for a rational basis standard of review.

where they rest upon some ground of difference which justifies the classification and has a fair and substantial relationship to the object of the legislation. *Curtis*, 542 Pa. at 255, 666 A.2d at 268. "Inequalities may result as long as some reasonable basis is apparent for the classification." *Goodman v. Kennedy*, 459 Pa. 313, 325, 329 A.2d 224, 230 (1974). Such inequities in the distribution of benefits as found here are an unfortunate concomitant of complex socio-economic legislation which must ultimately reflect a balance between legislative efforts to provide pension benefits to a multitude of state employees and the administrative and fiscal realities of allocating scarce financial resources. Consequently, Appellant could not convert his Class A service to Class AA.

IV. Class D-4

Our threshold inquiry with respect to Appellant's application for Class D-4 membership is whether his request to convert his Class A service to Class D-4 service conformed with the requirements of 71 Pa.C.S 5306.2(a) of the Retirement Code. Section 5306.2(a) reads as follows:

> (a) General rule. A member of the General Assembly who on the effective date of this section is eligible for Class D-4 membership may elect to become a member of Class D-4. **The election to become a Class D-4 member must be made by the member of the General Assembly by filing written notice with the board before July 1,**

> **2001, or before the member terminates State service as a member of the General Assembly, whichever occurs first.**

71 Pa.C.S 5306.2 (emphasis added).

Section 5306.2, which became effective on May 17, 2001, requires members of the General Assembly seeking Class D-4 status to elect Class D4 membership before they terminate state service as a member of the General Assembly, or on July 1, 2001, whichever occurred first. Appellant terminated his Senate service on November 30, 1988. Therefore, at the time he attempted to elect Class D-4 membership, he was no longer a member of the General Assembly. As such, Appellant was ineligible for election of Class D-4 membership since such election was restricted to members of the General Assembly.

Appellant also asserts that section 5306.2, which restricts election of Class D-4 to members of the General Assembly and which sets forth the time requirements within which a Class D-4 election must be made, is unconstitutional on its face as it violates the equal protection clause by limiting the election of Class D-4 membership to members of the General Assembly. On the same grounds, Appellant asserts that 71 Pa.C.S. 5306(a.2), which sets forth the specific requirements for Class D-4 membership, is unconstitutional. Section 5306(a.2) reads, in pertinent part, as follows:

> Class of membership for members of the General Assembly.

(1) A person who:

(i) becomes a member of the General Assembly and an active member of the system after June 30, 2001; or

(ii) is a member of the General Assembly on July 1, 2001, but is not an active member of the system because membership in the system is optional pursuant to section 5301 and who becomes an active member after June 30, 2001;

and who was not a State police officer on or after July 1, 1989, shall be classified as a Class D-4 member and receive credit as a Class D-4 member for all State service as a member of the General Assembly upon payment of regular member contributions for Class D-4 service and, subject to the limitations contained in subsection (a.1)(7), if previously a member of Class A or employed in a position for which Class A service could have been earned, shall receive Class AA service credit for all Class A State service, other than State service performed as a State police officer or for which a class of service other than Class A or Class D-4 was or could have been elected or credited.

(2) Provided an election to become a Class D-4 member is made pursuant to section 5306.2 (relating to elections by members of the General Assembly), a State employee who was not a State police officer on or after July 1, 1989, who on July 1, 2001, is a member of the General Assembly and an active

> member of the system and not a member of Class D-3 shall be classified as a Class D-4 member and receive credit as a Class D-4 member for all State service performed as a member of the General Assembly not credited as another class other than Class A upon payment of regular member contributions for Class D-4 service and, subject to the limitations contained in paragraph (a.1)(7), shall receive Class AA service credit for all Class A State service, other than State service performed as a State police officer or as a State employee in a position in which the member could have elected a class of service other than Class A, performed before July 1, 2001.
>
> . . .

71 Pa.C.S. 5306(a.2).

Appellant argues that 71 Pa.C.S. 5306 permitted those members of the General Assembly who were state legislators on or after July 1, 2001 to receive enhanced Class D-4 benefits while precluding from Class D-4 state employees who were no longer members of the state legislature on July 1, 2001. He asserts that because legislators who were active members of the General Assembly on the date Class D-4 membership became effective were able to receive Class D-4 benefits for their service prior to July 1, 2001, section 5306 unfairly and arbitrarily precludes him from enjoying Class D-4 benefits for his similar previous years of legislative service.

We have explained that the Legislature's decision to exclude certain SERS members on grounds of financial expedience constituted a rational basis for exclusion from a retirement class. The Legislature's decision to exclude from Class D-4 those state employees who on July 1, 2001, were not members of the General Assembly has a basis in fiscal soundness. If Appellant were successful on his claim such that all former legislators were granted Class D-4 status, the financial impact on the retirement system would be substantial. This financial burden constitutes a sufficient rational basis for the Legislature's decision to limit membership in Class D-4 to legislators who were members of the General Assembly on July 1, 2001, the date on which Class D-4 membership became effective.

Furthermore, in requiring those who elect class D-4 membership to be active members of the General Assembly, the Legislature ensured that those who benefited from the Class D-4 enhancements would consequently be making the required increased contributions towards their pensions.[9] The Legislature's

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[9] We note that not all members of Class AA were required to make the increased contributions necessary for Class AA membership since it was possible that a state employee could elect Class AA membership and retire before being required to make any of the increased contributions associated with Class AA membership. We agree with the Commonwealth Court that the Legislature has an interest in requiring class members to make the contributions associated with that class. However, the Legislature in enacting section 5306 opted to forgo that interest,

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interest in having Class D-4 members make future contributions towards their pension constitutes an additional rational basis to limit the election of Class D-4 membership to legislators who were members of the General Assembly on July 1, 2001. Consequently, because the exclusion of Appellant from membership in Class D-4 is supported by legitimate purposes, the Act 9 classifications limiting membership to Class D-4 pass constitutional muster. Appellant was unable to elect membership in Class D-4 as he was not a member of the General Assembly at the time he attempted to make this election. Therefore, Appellant is precluded from converting his Class A service to Class D-4.

For all the foregoing reasons, we reverse the Commonwealth Court regarding Class AA membership and affirm regarding Class D-4 membership. Jurisdiction is relinquished.

Justice SAYLOR did not participate in the consideration or decision of this case.

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and, to a limited degree, permit membership in Class AA without the payment of increased contributions by permitting members to elect Class AA membership and retire before January 1, 2002 when membership in Class AA became effective. In excluding Appellant, as a Class E-1 member from Class AA, the Legislature, as we have explained, possessed sufficient separate and distinct rational bases to overcome his constitutional challenge that he was impermissibly barred from Class AA.

Chief Justice CAPPY, and Justice CASTILLE, EAKIN, BAER, and FITZGERALD join the opinion.

APPENDIX "B"

890 A.2d 1173

Commonwealth Court of Pennsylvania.
James R. KELLEY, Petitioner
v.
STATE EMPLOYEES' RETIREMENT BOARD,
Respondent.
Argued Dec. 14, 2005.
Decided Jan. 24, 2006.
As Amended Feb. 16, 2006.

Samuel C. Stretton, West Chester, for petitioner.

Nicholas Joseph Marcucci, Deputy Chief Counsel, Harrisburg, for respondent.

BEFORE: COLINS, President Judge, and McGINLEY, Judge, PELLEGRINI, Judge, FRIEDMAN, Judge, and LEADBETTER, Judge.

OPINION BY Judge FRIEDMAN.

James R. Kelley (Claimant) petitions for review of the April 7, 2005, order of the State Employees' Retirement Board (SERB), which denied Claimant's request to convert his 14.5250 years of service credit earned as a Pennsylvania State Senator from Class A to either Class D-4 or Class AA. We affirm SERB's denial of Claimant's request to convert his Class A service to Class D-4 service; however, we reverse SERB's denial of Claimant's request to convert his Class A service to Class AA service.

Claimant first became an active member of the State Employees Retirement System (SERS) on May

22, 1974, when he took office as an elected member of the Pennsylvania General Assembly. Claimant served in the Senate until November 30, 1988. During that time, Claimant accrued benefits as a Class A member and was credited with 14.5250 years of state service. When Claimant terminated his Senate service, he was vested in SERS retirement benefits, but he did not withdraw his accumulated deductions and did not apply for an annuity. (Findings of Fact, Nos. 2-4, 7.)

From June 21, 1990, to December 31, 2001, Claimant served as a judge of the Commonwealth Court of Pennsylvania. While a judge, Claimant was an active member of SERS and was credited with 11.5278 years of Class A service. However, under *Goodheart v. Casey,* 521 Pa. 316, 555 A.2d 1210, *aff'd on reconsideration,* 523 Pa. 188, 565 A.2d 757 (1989),[1] Claimant elected to become a Class E-1 member of

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[1] In *Goodheart,* judges of the courts of common pleas challenged the constitutionality of the 1974 amendments to the State Employees' Retirement Code, 71 Pa.C.S. §§ 5101-5956, which reduced pension benefits for judges who entered office after March 1, 1974. Our supreme court stated: (1) to maintain the judiciary as a co-equal branch of government, the legislature has a duty under the constitution to provide adequate compensation for judges; (2) there can be but one adequate amount of compensation for each judge of the same court; and (3) compensation includes retirement benefits. Thus, the court held that judges who entered office after March 1, 1974, were to be given an opportunity to pay back into the system sufficient funds to permit the conversion of their retirement package into the same benefits received by judges who entered office before March 1, 1974. *Id.*

SERS; thus, Claimant's service as a judge is credited as Class E-1. (Findings of Fact, Nos. 8-9, 11, 13.)

The Act of May 17, 2001, P.L. 26, (hereinafter, Act 9) amended the State Employees' Retirement Code (Retirement Code), 71 Pa.C.S. §§ 5101-5956, by creating two new classes of state service, *viz.* Class AA and Class D-4. On October 26, 2001, Claimant requested information from SERS regarding the classes of service available to him for his Class A service in the Senate. On December 17, 2001, SERS informed Claimant that Class A service was the only class available and that Claimant could not convert his Class A service in the Senate to Class AA or Class D-4 service.[2] On December 27, 2001, Claimant sought review of the decision with the SERS Appeals Committee. (Findings of Fact, Nos. 22, 39-41.)

On December 31, 2001, Claimant reached mandatory retirement age, and his service as an active judge ended. Claimant applied for an annuity from SERS with an effective date of January 1, 2002. Claimant's application was subject to a reservation of his claim for Class AA or Class D-4 service credit for his Senate service. SERS calculated Claimant's annuity based on 14.5250 years of Class A service and

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[2] We note that Class A members have a 2% benefit accrual rate for each year of service; Class AA members have a 2.5% benefit accrual rate for each year of service; and Class D-4 members have a 3% benefit accrual rate for each year of service. (Findings of Fact, No. 37.)

11.5278 years of Class E-1 service. (Findings of Fact, Nos. 14-16, 44.)

On February 1, 2002, SERS informed Claimant that the Appeals Committee denied his request to convert his Class A service as a Senator to Class AA or Class D-4 service. On February 20, 2002, Claimant filed a timely appeal. (Findings of Fact, Nos. 42-43.)

In lieu of a hearing, the parties submitted Stipulations and Exhibits to the Hearing Examiner. Claimant argued, *inter alia,* that: (1) Act 9 violated his equal protection rights by excluding judges with prior Class A legislative service from that class of state employees who were entitled to convert their prior Class A service to Class D-4 or Class AA service; and (2) Act 9 impaired his contract for pension benefits. After considering the matter, the Hearing Examiner ruled that Claimant's request for Class D-4 service credit was time-barred because Claimant did not make a request by June 30, 2001, as required by section 5306.2(a) of the Retirement Code, 71 Pa.C.S. § 5306.2(a). With respect to Claimant's request for Class AA credit, the Hearing Examiner concluded that Act 9 did not violate Claimant's equal protection rights or impair his contract for pension benefits. Claimant filed exceptions with SERB, which, on April 7, 2005, denied Claimant's request to convert his prior Class A service to Class AA or Class D-4 service. Claimant now petitions this court for review.[3]

I. Timeliness of Class D-4 Request

Claimant first argues that SERB erred in concluding that Claimant's request to convert his Class A service to Class D-4 service was untimely under section 5306.2(a) of the Retirement Code. We agree.

Section 5306.2(a) of the Retirement Code, which became effective on May 17, 2001, states:

> A ***member of the General Assembly*** who on the effective date of this section is eligible for Class D-4 membership ***may elect*** to become a member of Class D-4 . . . by filing written notice with [SERB] ***before July 1, 2001,*** or before the member terminates State service as a member of the General Assembly, whichever occurs first.

71 Pa.C.S. § 5306.2(a) (emphasis added). Because Claimant was not a member of the General Assembly between May 17, 2001, and July 1, 2001, this provision did not apply to him.

In fact, on December 17, 2001, when SERS initially advised Claimant that he could not convert his Class A service to Class D-4 service, SERS stated, "because you are a former member of the General Assembly, and not a current member of the General Assembly . . . ***§ 5306.2 [is] not applicable to you.*"** (R.R. at A-72) (emphasis added). Notably, SERS did ***not*** inform Claimant that his request to convert Class A service to Class D-4 service was denied because Claimant failed to file a timely notice under section 5306.2(a) of the Retirement Code.

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[3] Our scope of review is limited to determining whether constitutional rights were violated, whether an error of law was committed or whether the necessary findings of fact are supported by substantial evidence. Section 704 of the Administrative Agency Law, 2 Pa.C.S. § 704.

Moreover, in concluding that Claimant's request for Class D-4 service credit was untimely under section 5306.2(a) of the Retirement Code, SERB failed to realize that Claimant's equal protection challenge extends to section 5306.2(a) of the Retirement Code ***because*** that provision limits the election of Class D-4 membership to current members of the General Assembly. If Claimant were to prevail on his equal protection argument, so that Class E-1 members with prior Class A service in the General Assembly would be eligible for Class D-4 service credit, it would be necessary for SERS to provide notice of this change in the Class D-4 eligibility requirements and an opportunity for newly eligible individuals to elect Class D-4 membership.

II. Equal Protection

The next question is whether Act 9 violates Claimant's equal protection rights by excluding him from those allowed to convert their prior Class A service to Class AA or Class D-4 service. In performing an equal protection analysis, we are guided by the principle that a strong presumption exists that all legislation promulgated by the General Assembly is constitutional. *Curtis v. Kline,* 542 Pa. 249, 666 A.2d 265 (1995).

The essence of equal protection under the law is that like persons in like circumstances will be treated similarly. *Id.* However, equal protection does not require that all persons under all circumstances enjoy identical protection under the law. *Id.* Thus, the right to equal protection does not absolutely prohibit the Commonwealth from classifying individuals for the purpose of receiving different treatment, provided that the classifications are reasonable rather than arbitrary and bear a reasonable relationship to the object of the legislation. *Id.* "In other words, a classification must rest upon some ground of difference which justifies the classification and have a fair and substantial relationship to the object of the legislation." *Id.* at 255, 666 A.2d at 268.

> Judicial review must determine whether any classification is founded on a real and genuine distinction rather than an artificial one. A classification, though discriminatory, is not arbitrary or in violation of the equal protection clause if any state of facts reasonably can be conceived to sustain that classification. In undertaking its analysis, the reviewing court is free to hypothesize reasons the legislature might have had for the classification. If the court determines that the classifications are genuine, it cannot declare the

> classification void even if it might question the soundness or wisdom of the distinction.

Id. at 255-56, 666 A.2d at 268 (citations omitted).

There are three different types of classifications: (1) those which implicate a suspect class or a fundamental right; (2) those which implicate an important though not fundamental right or a sensitive classification; and (3) those which involve none of these. *Id.* If the statutory classification falls into the first category, the statute is strictly construed in light of the compelling governmental purpose; if the classification falls into the second category, a heightened standard of scrutiny is applied to an important governmental purpose; and if the statutory scheme falls into the third category, the statute is upheld if there is any rational basis for the classification. *Id.*

Claimant contends that, under *Klein v. State Employees' Retirement System*, 521 Pa. 330, 555 A.2d 1216 (1989), Act 9 impinges upon the fundamental right of judges to be independent; thus, this court must exercise strict scrutiny. We disagree.

Klein involved a constitutional challenge to the 1974 amendments to the Retirement Code, which created a two-tiered retirement system for judges who performed the same functions and duties. Essentially, the amendments provided that judges who entered office after March 1, 1974, received a lesser retirement benefit than judges who entered office before March 1, 1974. Our supreme court was divided as to whether the two-tiered system involved a fundamental right and whether it violated the equal protection rights of judges.

In the Opinion Announcing the Judgment of the Court, Justice Larsen, joined by Justices Zappala and Papadakos, stated that the two-tiered system of benefits is unconstitutional as inimical to and destructive of the "unified judicial system" mandated by Article V, Section 1 of the Pennsylvania Constitution.[4] In a secondary analysis, Justice Larsen held that the creation of unequal classes of judges based solely on their date of entry into the retirement system was arbitrary, unreasonable and unconstitutional under the equal protection provisions of the Pennsylvania Constitution. In so holding, Justice Larsen stated that the affected interest involved the independence and integrity of the judiciary, a ***fundamental right*** requiring strict scrutiny.[5] *Id.*

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[4] Justice Larsen stated that the words "unified judicial system" required that all judges of a single level, or court, performing similar functions and exercising similar authority be paid at the same rate of compensation. *Klein.* Claimant suggests that this same reasoning applies to members of the General Assembly performing the same duties. However, our supreme court held otherwise in *Harper v. State Employees' Retirement System,* 538 Pa. 520, 649 A.2d 643 (1994).

[5] Justice Larsen explained that the legislature has the power of life and death over the judiciary because of the legislature's authority to establish funding for the courts, including the compensation of judges. Justice Larsen indicated that the legislature could make a mockery of our form of government by making it impossible through inadequate judicial compensation for the courts to function as an independent body. *Klein.*

In a concurring opinion, Justice Nix, joined by Justices Flaherty and Stout, disagreed that there was an equal protection violation, explaining that the interest involved was simply the right to be paid a fair amount for employment. Therefore, the test was whether a ***rational basis*** existed for giving judges who entered office after March 1, 1974, a lesser retirement benefit than judges who entered office before March 1, 1974. Justice Nix stated that the judges in the case were not coerced into seeking office and accepted the prevailing compensation as fair at the time they assumed office. Thus, there was no deprivation impinging on the right to fair compensation.

Justice McDermott dissented without opinion in *Klein*, implicitly disagreeing that there was an equal protection violation. Thus, four of the seven justices believed that the two-tiered pension system for judges did ***not*** involve a fundamental right and did ***not*** violate the judges' equal protection rights.[6]

Here, then, to determine whether Act 9 violates Claimant's equal protection rights, this court shall employ the rational basis test, which involves a two-step analysis.

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[6] In *Harper*, our supreme court explicitly stated that, in *Klein*, a majority of the court never adopted Justice Larsen's view that a two-tiered judicial pension system involves a fundamental right requiring strict scrutiny. *Harper*.

> First, we must determine whether the challenged statute seeks to promote any legitimate state interest or public value. If so, we must next determine whether the classification adopted in the legislation is reasonably related to accomplishing that articulated state interest or interests.

Curtis, 542 Pa. at 257, 666 A.2d at 269.

A. Articulated State Interest

Section 1(2) of Act 9 provides, in pertinent part, as follows:

> ***Over the past two decades, [the] pension funds have experienced investment returns well in excess of expectations.*** As a result, State . . . contributions have decreased dramatically to less than 1% of payroll for next year. At the same time, employee contributions range from 5% to 6.25% of payroll. The outstanding investment performance has resulted in the pension funds being over 123% funded, compared to current needs. ***The 4% statutory interest rate the employees receive on their pension accounts has consistently been eclipsed by the actual average returns of the funds over the last two decades and also has been less than available private market interest rates.*** The fact that employees have been and are projected to continue to contribute at a rate that is materially greater than the employers due to the more than

> 100% funded status of the plans raises the issue of the extent to which employees should be provided additional benefits. ***The increase in benefits for State . . . employees provided herein will in effect allow*** *them for the first time to share in the outstanding investment performance of the funds.* To date, that experience has only benefited the employers through reduced contributions to the funds. Even with the increases in benefits provided herein, [the] pension funds are projected to maintain minimal employer contribution rates and at the same time maintain a fully funded status.

In other words, the stated purpose of Act 9, which is legitimate, is to rectify the fact that, for the past twenty years, state employees have received only 4% statutory interest on their required contributions. With the passage of Act 9, the legislature decided to allow state employees to share in the twenty years of higher-than-expected returns on their contributions. Toward that end, the legislature created Class AA and Class D-4.

B. Reasonably Related to Accomplishing State Objective

The next question is whether the classification adopted in Act 9, which excludes Claimant from those persons allowed to convert prior Class A service to Class AA or Class D-4, is reasonably related to accomplishing the articulated state objective, *i.e.*, sharing with state employees the twenty years of higher-than-expected returns on contributions.

1. Class AA

Section 5306(a.1)(3) of the Retirement Code provides, in pertinent part, as follows:

> Provided that an election to become a Class AA member is made pursuant to section 5306.1 . . . ***a State employee . . . who on June 30, 2001, and July 1, 2001, is . . . a member of Class A*** . . . shall be classified as a Class AA member and receive credit for Class AA State service performed after June 30, 2001, upon payment of regular member contributions for Class AA service and, subject to the limitations contained in paragraph (7), ***shall receive Class AA service credit for all Class A State service . . . performed before July 1, 2001***.

71 Pa.C.S. § 5306(a.1)(3) (emphasis added). Section 5306.1 of the Retirement Code provides, in pertinent part, as follows:

> (a) General rule. – A person who is . . . a member of the system . . . who on July 1, 2001, is eligible for Class AA membership may elect to become a member of Class AA.
>
> (b) Time for making election. – The election to become a Class AA member must be made by the member filing written notice with the board ***before January 1, 2002,*** or before the

> member terminates State service . . . whichever occurs first.
>
> (c) Effect of election. – An election to become a Class AA member shall become ***effective the later of July 1, 2001, or the date when the election is filed*** with the board and shall remain in effect until the termination of employment. . . .

71 Pa.C.S. § 5306.1 (emphasis added).

The Hearing Examiner found, and SERB acknowledged at oral argument, that, under these provisions of Act 9, Class A members who elected Class AA membership and retired before January 1, 2002, received Class AA benefits for prior Class A service ***without ever paying the increased employee contributions associated with Class AA membership.***[7] (*See* Hearing Examiner's op. at 17.) With respect to these individuals, Act 9 simply allowed them to share in the higher-than-expected investment returns on their contributions over the prior twenty years.

Claimant is similarly situated with these individuals. Like them, Claimant paid Class A contributions into the pension fund during the twenty-year period of outstanding investment performance. Like them, Claimant sought Class AA membership and retired before January 1, 2002. Like them, Claimant never was required to pay the increased employee contributions associated with Class AA membership. However, the legislature did not allow Class E-1 members with prior Class A service, like Claimant, to share in the higher-than-expected returns earned on their Class A contributions. By deciding ***not*** to allow Claimant to share in the higher-than-expected returns earned on ***his*** money, the legislature, in effect, gave the additional earnings on ***Claimant's*** Class A contributions to other state employees. Such a result is not reasonably related to accomplishing the articulated purpose of Act 9.

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[7] This is because, pursuant to Act 9, the "class of service multiplier" for the purpose of calculating Class AA member contributions for state service rendered prior to ***January 1, 2002,*** is the same as the "class of service multiplier" for Class A contributions. (*See* Stipulations of Fact, No. 29, R.R. at A55; *see also* 71 Pa.C.S. § 5102.)

This does not end our inquiry. The Hearing Examiner determined that there were other rational bases for excluding Claimant from those entitled to convert their prior Class A service to Class AA service.

The Hearing Examiner concluded that the Class E-1 exclusion was rational because judges already are entitled to receive benefits in excess of the rank and file state worker. However, Claimant is not seeking increased benefits for his Class E-1 service as a judge. Rather, Claimant is seeking enhanced benefits for his prior Class A service, which, under Act 9, does ***not*** provide Claimant with benefits that are in excess of the rank and file state worker. In fact, under Act 9, Claimant's prior Class A service yields him benefits for those years of service that are ***less than*** the benefits of a rank and file Class AA member. Accordingly, Claimant's entitlement to greater retirement benefits for his Class E-1 service does not justify denying Claimant greater benefits for his Class A service.

The Hearing Examiner also concluded that the Class E-1 exclusion was rational because the legislature must be able to adjust compensation packages for state employees within the limits of fiscal resources. However, Act 9 states that, even with the increased benefits, the pension funds are projected to maintain minimal employer contribution rates and at the same time maintain a fully funded status. Moreover, if allowing Claimant and others similarly situated to convert their prior Class A service to Class AA service requires further adjustments to the pension system, the legislature may make appropriate adjustments as needed in the future.[8]

Accordingly, we conclude that SERB violated Claimant's equal protection rights by denying his request to convert his prior Class A service to Class AA service.

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[8] We note that the Hearing Examiner made no findings of fact regarding the impact of allowing Class E-1 members like Claimant to convert Class A service to Class AA service. (*Cf.* Findings of Fact, Nos. 35-38.) Indeed, we are unaware that any other excluded member with prior Class A service retired between June 30, 2001, and January 1, 2002.

2. Class D-4

Section 5306(a.2) of the Retirement Code provides, in pertinent part, as follows:

> (2) Provided an election to become a Class D-4 member is made pursuant to section 5306.2 (relating to elections by members of the General Assembly), a ***State employee . . . who on July 1, 2001, is a member of the General Assembly*** and an active member of the system and not a member of Class D-3 ***shall*** be classified as a Class D-4 member and ***receive credit as a Class D-4 member for all State service performed as a member of the General Assembly*** not credited as another class other than Class A upon payment of regular member contributions for Class D-4 service and, subject to the limitations contained in paragraph (a.1)(7), shall receive Class AA service credit for all Class A State service. . . .

71 Pa.C.S. § 5306(a.2) (emphasis added). Section 5306.2 of the Retirement Code states that Class D-4 election must be made by July 1, 2001, and that Class D-4 membership shall be effective on July 1, 2001. 71 Pa.C.S. § 5306.2. Thus, unlike Class AA membership, there is no period of time during which Class D-4 members with prior Class A service can retire without paying increased contributions.

In *Donahue v. Public School Employees' Retirement System,* 834 A.2d 655 (Pa.Cmwlth.2003), *aff'd,* 580 Pa. 14, 858 A.2d 1162 (2004), *cert. denied,* 543

U.S. 1122, 125 S.Ct. 1099, 160 L.Ed.2d 1070 (2005), this court held that, where Act 9 requires the payment of increased contributions as consideration for the future receipt of enhanced benefits, Act 9 may limit participation in a new class to contributing members without violating the equal protection clause. Because Claimant did not pay increased contributions for Class D-4 benefits, SERB did not violate Claimant's equal protection rights by denying his request to convert his Class A benefits into Class D-4 benefits.[9]

III. Impairment of Contract

Article I, Section 17 of the Pennsylvania Constitution states that the legislature shall pass no law impairing the obligation of contracts. Pa. Const., Art.

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[9] We note that Claimant has ***not*** argued that the legislature should have allowed ***former*** Class A members of the General Assembly to ***purchase*** Class D-4 service credit by paying Class D-4 contributions for their period of Class A service. Claimant's argument is only that, because current members of the General Assembly can convert their prior Class A service to Class D-4 service without paying increased contributions, Claimant should be able to do so. We recognize that the "class of service multiplier" used for calculating Class D-4 contributions for service rendered prior to July 1, 2001, is the same as the Class A "class of service multiplier." *See* 71 Pa.C.S. § 5102. However, it is not true that current members of the General Assembly could convert their prior Class A service to Class D-4 service without paying increased contributions. Act 9 requires that members of the General Assembly who elect Class D-4 membership begin paying the increased contributions as of July 1, 2001, in order to receive Class D-4 credit for their prior Class A service.

I, § 17. The statutory terms of the Retirement Code are deemed to be contractually binding on the Commonwealth. *Cianfrani v. State Employees' Retirement Board,* 505 Pa. 294, 479 A.2d 468 (1984). Thus, the Retirement Code is in the nature of a contract for pension benefits. For that reason, unilateral modifications in the retirement system may not be adverse to a member who has met retirement eligibility requirements. *Association of Pennsylvania State College and University Faculties v. State System of Higher Education,* 505 Pa. 369, 479 A.2d 962 (1984).

In *Rybak v. State Employees' Retirement Board,* 154 Pa.Cmwlth. 586, 624 A.2d 286 (1993), *aff'd,* 538 Pa. 476, 649 A.2d 431 (1994), a legislator retired in 1972 and received a Class D-3 annuity under the 1959 Retirement Code. He was re-elected in 1980 and retired for the second time in 1990. This time, he received a Class A annuity under the 1974 Retirement Code, which had eliminated Class D-3. The legislator sought another Class D-3 pension, arguing an unconstitutional impairment of his pension contract. This court stated that, when the legislator was re-elected in 1980, he was party to a new employment contract and that the prior contract had ended. *Id.*

Here, the relevant contract between the Commonwealth and Claimant is the 1974 Retirement Code, which provided Claimant with Class A retirement benefits for his years of service in the General Assembly. Act 9 did not modify that contract to Claimant's detriment. Thus, Act 9 did not impair that contract.

Based on the foregoing, we affirm SERB's denial of Claimant's request to convert his Class A service to Class D-4 service; however, we reverse SERB's denial of Claimant's request to convert his Class A service to Class AA service.[10]

Judges SMITH-RIBNER, SIMPSON and LEAVITT did not participate in the decision in this case.

ORDER

AND NOW, this 24th day of January, 2006, the order of the State Employees' Retirement Board, dated April 7, 2005, is reversed to the extent that it denies James R. Kelley's (Claimant) request to convert his Class A service to Class AA service. The order is affirmed to the extent that it denies Claimant's request to convert his Class A service to Class D-4 service.

CONCURRING AND DISSENTING OPINION BY Judge PELLEGRINI.

Because it has been clearly, palpably and plainly demonstrated that the exclusion of certain classes of members being allowed to convert Class A service credit to Class AA service has a rational basis, I respectfully dissent from that portion of the majority's decision finding that Section 5306(a.1)(3) of Act

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[10] This opinion is filed pursuant to Commonwealth Court IOP 256(b).

9[1] violates the equal protection clauses of both the Pennsylvania and United States Constitution. Moreover, the majority's rationale will open the floodgates to many other challenges that will call into question the continuing viability of Act 9[2], both constitutionally and financially.

James R. Kelley (Claimant) became a member of the State Employees Retirement System (SERS) on May 22, 1974, when he was elected as a Senator in the Pennsylvania General Assembly. Claimant continued to serve as a Senator until November 30, 1988. During that time, Claimant's SERS benefits were categorized as Class A. Claimant later served as a judge of the Commonwealth Court of Pennsylvania from June 21, 1990 to December 31, 2001. While serving as a Judge, he elected to become a Class E-1 member.[3] Just before his retirement, the General Assembly enacted Section 5306(a.1)(3) of Act 9, 71 Pa.C.S. § 5306(a.1)(3), allowing state employees who were Class A active members on June 30 and July 1, 2001, to elect to become members of Class AA for their past and future State service *only if they were not a member of another class that was already*

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[1] 71 Pa.C.S. § 5306(a.1)(3).

[2] Act of May 17, 2001, P.L. 26, No. 9, 53 P.S. §§ 5101-5956.

[3] Class E-1 is only available to judges and allows them to contribute at a greater percentage than Class A members. It also provides a higher multiplier (in Claimant's case, 1.50) than Class A members (1) which, in turn, results in a greater payment to the member.

receiving higher benefits which included Class E-1 for judges.[4] Additionally, under Section 5306(a.2)(1), only active members of the General Assembly as of June 30, 2001 or July 1, 2001, could elect to obtain Class AA credit provided that Class D-4 credit was not or could not have been elected.[5]

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[4] 71 Pa.C.S. § 5306(a.1)(3) provides:

> Provided that an election to become a Class AA member is made pursuant to section 5306.1 (relating to election to become a Class AA member), a State employee, other than a State employee who is a State police officer on or after July 1, 1989, who on June 30, 2001, and July 1, 2001, is:
>
> (i) a member of Class A, **other than a member of Class A who could have elected membership in a** Class C, Class D-3, **Class E-1** or Class E-2;
>
> * * *
>
> shall be classified as a Class AA member and receive credit for Class AA State service performed after June 30, 2001, upon payment of regular member contributions for Class AA service and, subject to the limitations contained in paragraph (7), shall receive Class AA service credit for all Class A State service, **other than State service performed** as a State police officer or **as a State employee in a position for which the member could have elected membership in** Class C, Class D-3, **Class E-1** or Class E-2, **performed before July 1, 2001.** (Emphasis added.)

[5] That section provides:

> A person who:
>
> (i) becomes a member of the General Assembly and an active member of the system after June 30, 2001; or

(Continued on following page)

When Claimant retired, he applied for an annuity subject to a reservation for Class AA or for his years of service as a Senator. SERS denied his request to change the class of his service credit while a Senator, and Claimant appealed to the State Employees Retirement Board which affirmed. Claimant then appealed to this Court.[6] Determining that 71 Pa.C.S. § 5306(a.1)(3) excluded Claimant and, inferentially, all other members of classes similarly excluded by that provision, the majority reverses, finding that there was no rational basis to exclude Claimant from receiving the same credit as active members of the General Assembly and, therefore, that provision of

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> (ii) is a member of the General Assembly on July 1, 2001, but is not an active member of the system . . .
>
> and who was not a State police officer on or after July 1, 1989, shall be classified as a Class D-4 member and receive credit as a Class D-4 member for all State service as a member of the General Assembly upon payment of regular member contributions for Class D-4 service and, subject to the limitations contained in subsection (a.1)(7), if previously a member of Class A or employed in a position for which Class A service could have been earned, shall receive Class AA service credit for all Class A State service, **other than State service performed . . . for which a class of service other than Class A or Class D-4 as or could have been elected or credited.** (Emphasis added.)

[6] The Claimant also sought Class D-4 service credit. Because the majority found that Claimant is not entitled to credit for Class D-4, I concur only in that portion of the majority's opinion. I join with the majority where it holds that there was no impairment of contract claims made out under Article I, Section 17 of the Pennsylvania Constitution.

Act 9 violates the equal protection clauses of the United States and Pennsylvania Constitutions.

The majority reasons that the articulated purpose of Act 9 is to correct the contribution return for the past 20+ years during which time state employees have received only 4% interest on contributions that they made to the Retirement Fund which have been eclipsed by the average rate of return. Because Claimant was similarly situated to other members of the Retirement Fund who were in the same position, the majority concludes there was no rational basis for treating him differently than those other members, and he should be allowed to share with state employees the 20 years of higher-than-expected returns on contributions. It holds that:

> By deciding not to allow Claimant to share in the higher-than-expected returns earned on his money, the legislature, in effect gave additional earnings on Claimant's Class A contributions to other state employees. Such a result is not reasonably related to accomplishing the articulated purpose of Act 9.

(Opinion at 1182.) In other words, the majority is espousing that the purpose of the legislation is to give money back to those employees who made contributions on what was earned at that higher-than-expected return. I disagree with the majority because I believe its equal protection analysis is fatally flawed.

The core flaw in the majority's argument is that it looks to the reason behind the enactment of the legislation which is entirely different from the reason why the General Assembly made the classifications at issue. First, the majority assumes that the amount raised is sufficient to allow *all other individuals* to be allowed to convert service or receive increased benefits. While the rate of return may have been greater than expected, that does not necessarily mean that there were sufficient funds to give every member of every class increased pension benefits. The General Assembly, in excluding those classes, made the finding that there was only sufficient funds for Class A members, who did not belong to another class that already received increased benefits, to receive that increase. The General Assembly's exclusion of Class E-1 (judges), Class C (state police and enforcement officers), Class D-3 (legislators), or Class E-2 (district justices) members is valid because all of those classes already receive pensions at a higher rate than other state employees. This alone is a rational basis for the difference in the classification.

Second, limiting Class AA membership to current Class A members is not irrational because to hold otherwise would mean that giving rights or excluding rights to individuals who are not members of a class itself would be irrational. In *Donahue v. Public School Employees Retirement System,* 834 A.2d 655 (Pa.Cmwlth.2003), *aff'd,* 580 Pa. 14, 858 A.2d 1162 (2004), *cert. denied,* 543 U.S. 1122, 125 S.Ct. 1099, 160 L.Ed.2d 1070 (2005), we held Act 9 did not discriminate against persons who retired before the Act's effective date of July 1, 2001, because it did not afford them the same increase in retirement benefits provided to those persons still employed and contributing to the respective retirement systems. While we stated the distinction was valid because current members contributed at an increased rate, the underlying basis was that there was a rational basis of treating active employees differently than retired employees because retired employees could not make a contribution. The same rational basis exists for treating current Class A employees differently from Class E-1 employees; otherwise, it would call into question those classifications themselves.

Third, in a similar vein is the majority's conclusion that the higher-than-expected return on contributions has to be allocated to those individuals whose contributions made those returns possible. It would be illogical to limit increased benefits to only current members and not retired members. Over the 20 years mentioned in the preamble, as mentioned by the majority as the basis for its rational class analysis, a substantial amount of those contributions were made by members who retired at the lower Class A rate, some even the day before the legislation was enacted. It was the interest on their contributions that funded, in part, the increased pensions. To paraphrase the majority's reasoning, by deciding not to allow retired members of those classes to share in the higher-than-expected returns on their money, the General Assembly gave those additional earnings on their contributions to other state employees, and such a result is not reasonably related to the purpose of Act 9.[7]

Fourth, under the majority's reasoning, Class E-1 (judges), Class C (state police and enforcement officers), Class D-3 (legislators), or Class E-2 (district justices) members should also receive increased pensions because even though their pensions are higher, most pay a significantly higher rate of contribution, and those higher contributions received a higher-than-expected of return than expected. Again, to paraphrase the majority's reasoning, by deciding not to allow members of those classes to share in the higher-than-expected returns on their money, the General Assembly gave those additional earnings on their contributions to other state employees, and such a result is not reasonably related to the purpose of Act 9.

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[7] The majority's reasoning calls into question *Donahue*, where we held that Act 9 may limit participation in a class where the Act requires the payment of increased contributions as consideration for future receipt of enhanced benefits. *See* Section 5306(a.2) of Act 9, 71 Pa.C.S. § 5306(a.2). Even though the majority points out that Act 9 requires increased contributions as the basis of its distinction, once the purpose of Act 9 is defined, the majority's conclusion to pay out the higher-than-expected rate of return on contributions erodes that distinction and it becomes meaningless because retired members cannot make contributions – by definition, they are making no earnings on which to make contributions. However, higher-than-expected earnings on their contributions in part are funding the increases in pensions authorized by Act 9.

Fifth and finally, the majority ignores that classifications are to be presumed constitutional, and we are instructed to look for ways to hold the legislation constitutional – not go out of our way to strike down the legislation. In *Probst v. Department of Transportation, Bureau of Driver Licensing,* 578 Pa. 42, 849 A.2d 1135, 1144 (2004), our Supreme Court stated:

> In applying the rational basis test, we have adopted a two-step analysis. First, we determine whether the challenged statute seeks to promote any legitimate interest or public value. If so, we then determine whether the classification adopted in the legislation is reasonably related to accomplishing that articulated state interest or interests. In undertaking this analysis, **we are free to hypothesize reasons the legislature might have had for the classification, and will not declare a genuine classification void even if we might question the soundness or wisdom of the distinction**. Furthermore, we keep in mind that because presumption of constitutionality attaches to any lawfully enacted legislation, the burden is upon the party attacking a statute to rebut the presumption of constitutionality by **a clear, palpable, and plain demonstration that the rational basis test is not met**. (Citations omitted.)

849 A.2d at 1144.

The majority has only considered what made Act 9 possible and has not examined the possible reasons that would justify the legislation, resulting in the opening of floodgates to other claims. Because Claimant has not clearly, palpably and plainly demonstrated that there is not a rational basis for disallowing other class members to convert their previous Class A service to Class AA service, I respectfully dissent.

Judge LEADBETTER joins in this concurring and dissenting opinion.

DISSENTING OPINION BY Judge LEADBETTER.

I join in Judge Pellegrini's well-reasoned dissenting and concurring opinion. I write separately simply to emphasize his point that, "[t]he core flaw in the majority's argument is that it looks to the reason behind the enactment of the legislation which is entirely different from the reason why the General Assembly made the classifications at issue." (Op. at p. 1186) In other words, I strongly disagree that in an equal protection analysis the challenged distinction must be rationally related to the general overall purpose of the legislation, since the distinction drawn acts as a *limitation* on the legislation. Rather, the distinction must be rationally related to *some* legitimate government interest which justifies the limitation. Otherwise, almost any limitation on the effect of a law would be doomed from the start. Because I believe the majority has created an unwise and unworkable sea change in equal protection law, I must regrettably dissent.

Judge PELLEGRINI joins this dissenting opinion.

APPENDIX "C"

COMMONWEALTH OF PENNSYLVANIA
STATE EMPLOYEES' RETIREMENT BOARD

IN RE: ACCOUNT OF : DOCKET NO. 2002-02
JAMES R. KELLEY :
CLAIM OF :
JAMES R. KELLEY :

BEFORE: : Michael L. Bangs
: Hearing Examiner
: South 18th Street
: Camp Hill, PA 17011

DATE: : April 16, 2004

APPEARANCES: : Nicholas J. Marcucci, Esquire
: Counsel for SERS
: Samuel C. Stretton, Esquire
: Counsel for Claimant

OPINION OF THE HEARING EXAMINER

Findings of Facts

1. James R. Kelley (hereinafter referred to as "Claimant") is an annuitant member of the State Employees Retirement System (hereinafter "SERS"), and is also currently employed as a senior judge of the Commonwealth Court. (Stip. 3, 13)*

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* All Findings of Facts are based upon forty-four (44) enumerated Stipulations and six (6) Joint Exhibits appended thereto which were entered into by the parties on April 15, 2004

(Continued on following page)

2. Claimant first became an active member of SERS on May 22, 1974, when he took office as an elected member of the Pennsylvania General Assembly. (Stip. 4)

3. Claimant was elected state senator for three terms and served in the Pennsylvania Senate until November 30, 1988. (Stip. 5)

4. During Claimant's time as a member of the Senate, he accrued benefits as a Class A active member with a superannuation age of 50, and credited with 14.5250 years of State service. (Stip. 6)

5. From December 1, 1984 to November 30, 1988, Claimant's annual salary as a Senator was $35,000, pursuant to the Act of September 30, 1983, P.L. 160, No. 39, §4(a). (Stip. 7)

6. From July 1, 1987 to November 30, 1988, Claimant received an unvouchered expense allowance at the annual rate of $12,000, pursuant to the Act of July 3, 1987, P.L. 193, No. 28, §5.1(a), and SERS recognized this allowance as compensation for purposes of the State Employees' Retirement Code. (Stip. 7)

7. At the time Claimant terminated his Senate service, he became vested in SERS retirement benefits,

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and filed of record on April 16, 2004. The reference in the Findings of Facts will be to those individual enumerated Stipulations and to those Joint Exhibits as indicated in each Finding of Fact.

but he did not withdraw his accumulated deductions and did not apply for an annuity. (Stip. 8)

8. From June 21, 1990 to December 31, 2001, Claimant served as a Commonwealth Court judge. (Stip. 9)

9. While employed as a judge, the Claimant was an active member of SERS and was credited with 11.5278 years of Class A service with a superannuation age of 60. (Stip. 10)

10. The Claimant was not a member of the Social Security integration program. (Stip. 11)

11. In response to the Supreme Court's decision of *Goodheart v. Casey*,[1] the Claimant elected to become a Class E-1 member and a member of the Social Security integration program for his judicial service. (Stip. 12, Joint Exh. 1)

12. The Claimant elected to pay his member contributions for Class E-1 service and for Social Security integration service prior to July 1, 1993 in the form of an actuarial adjustment to his benefit. (Stip. 12, Joint Exh. 1)

13. Appropriate Class E-1 and Social Security integration employee and employer contributions were made in the normal manner on a contemporaneous and prospective basis for Claimant's service on

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[1] 555 A.2d 1210 (1989), on reconsideration at 565 A.2d 757 (1939).

and after July 1, 1993, the result of which was that all of Claimant's service as an active judge is now credited as Class E-1 and Social Security integration covered service. (Stip. 12, Joint Exhibit 1)

14. On December 31, 2001, the Claimant reached mandatory retirement and his service as an active judge ended, but he has continued to serve as a senior judge since that date. (Stip. 13)

15. Claimant applied for an annuity from SERS with an effective date of January 1, 2002. (Stip. 14)

16. SERS calculated the Claimant's annuity based upon the following:

14.5250 years of Class A service,

11.5278 years of Class E-1 (with Social Security. integration) service,

A final average salary of $126,162.33, and

Noncovered Social Security integration earnings of $515,597.57. (Stip 15.)

17. The Claimant elected to retire under Option 4, whereby he withdrew a lump sum equal to his total member contributions and credited statutory interest, and would receive an annuity.[2] (Stip. 16)

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[2] Under this benefit payment plan, colloquially known as "Option 2 with guaranteed total initial present value payments," Claimant will receive a monthly annuity. If Claimant predeceases his survivor annuitant, then his survivor annuitant will receive the same amount for the survivor annuitants life. If both

(Continued on following page)

18. After he began to receive said annuity payments from SERS, Claimant became eligible for a "supplemental annuity" (i.e., cost of living adjustment, hereinafter "COLA"), under new legislation effective July 1, 2003. 71 Pa.C.S. §5708.7 (Stip 17)

19. Reduced to present value, the Claimant's Maximum Single Life Annuity monthly payment on his effective date of retirement (before modification for any optional payment plan) was $8,392.68, with a present value of $1,043,052.36. (Stip. 18)

20. After withdrawing an amount equal to his accumulated deductions under Option 4, Claimant's Maximum Single Life Annuity monthly payment prior to selecting Option 2 with guaranteed total initial present value payments was $6,787.58. (Stip. 18)

21. The Claimant elected to receive $199,484.69 in a lump sum payment, plus a payment of $1,111.74 in post-termination interest, and $5,237.56 in monthly annuity payments (which the COLA increased to $5,356.45 effective July 1, 2003), with a total guaranteed annuity payment at the time of retirement of $843,567.67.[3] (Stip. 18)

Claimant and his survivor annuitant die before the arithmetic sum of their combined monthly annuities have totaled the initial present value of the annuity, the balance will be paid to a beneficiary designated by Claimant or to his estate. (Stip. 16)

[3] After the cost of living adjustment, if Claimant predeceases his survivor annuitant, then his survivor annuitant will

(Continued on following page)

22. The Act of May 17, 2001, P.L. 26, No. 9 (hereinafter "Act 9") amended, *inter alia*, the Retirement Code, 71 Pa.C.S. §§ 5101 *et seq.*, creating two new classes of state service, denoted "Class AA" and "Class D-4," and associated new Class of Service Multipliers. (Stip. 20)

23. Claimant, by this action, seeks to have his annuity calculated with his 14.5250 years of State Senate Class A service now credited as either Class AA service or Class D-4 service. (Stip. 21)

24. SERS has refused the Claimant's application, taking the position that (1) Act 9 does not permit Claimant to elect to convert his Class A service as a State Senator to Class AA or Class D-4 service, (2) this result is a valid exercise of legislative authority, and (3) Claimant may not receive Class AA or Class D-4 service credit for his service as a State Senator. 71 Pa. C.S. §§5306, 5306.1, 5306.2. (Stip. 22)

25. The COLA effective July 1, 2003 is not applicable to members whose credited service includes any

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receive $5356.45 per month for the survivor annuitant's life. The cost of living adjustment increased the total guaranteed payments by $17,008.91. After the cost of living adjustment, if both Claimant and his survivor annuitant die before their combined monthly annuity payments total $860,576.58, the difference between that amount and the total monthly annuity payments will be paid to Claimant's beneficiary. (Stip. 19) service credited as either Class AA or Class D-4. 71 Pa.C.S. §5708.7(g)(3).[4] (Stip. 23)

26. If Claimant is successful in receiving Class AA credit for his 14.5250 years of Senate service, then SERS estimates that his monthly Maximum Single Life Annuity would be approximately $9,156 with a present value of approximately $1,123,020. SERS estimates that his actual benefits and the benefits of his survivor annuitant under the option that he elected would be approximately $5,852 per month for all periods of retirement with estimated guaranteed total annuity payments of approximately $923,536. The amount he withdrew under Option 4 would not change. (Stip. 24)[5]

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[4] SERS's position is that if Claimant is successful in receiving Class AA or Class D-4 credit for his 14.4250 years of Senate service, then he would not be eligible for the cost of living adjustment effective July 1, 2003, and his benefits retroactive to July 1, 2003 and prospectively would be adjusted accordingly. (Stip. 24)

[5] Because of the variables involved, the parties have not calculated the precise adjustments or their impact on Claimant's benefits. SERS and Claimant have agreed, and this Hearing Examiner concurs, that the issue of Claimant's underlying legal entitlement can be determined without knowing the precise adjustments referred to herein and in the Stipulations, that would flow from a successful claim. Recalculation of actual benefits would not be bound by these estimates, and the parties have stipulated and agreed to defer any such calculation if, and until, Claimant is ultimately successful in having credit reclassified. (Stip 24)

27. If Claimant is successful in receiving Class D-4 credit for his 14.5250 years of Senate service, then SERS estimates that his monthly Maximum Single Life Annuity would be approximately $9,919 with a present value of approximately $1,209,478. SERS estimates that his actual benefits and the benefits of his survivor annuitant under the option that he elected would be approximately $6,399 per month for all periods of retirement with estimated guaranteed total annuity payments of approximately $1,009,922. The amount he withdrew under Option 4 would not change. (Stip 25)[6]

28. Because Claimant did not perform Class AA or D-4 service on or after July 1, 2001, he never paid Class AA or D-4 member contributions to SERS. (Stip. 26-27)

29. Because Claimant did not perform any Class A service on or after July 1, 2001 that would be reclassified as Class D-4 or Class AA service, if he is successful in his claim he will not owe retroactive member contributions or pay any Class AA or Class D-4 member contributions with a Class of Service Multiplier higher than "one" on any successfully converted Class AA or Class D4 service. 71 Pa. C.S. §5102 (definition of "Class of service multiplier"). (Stip. 28)

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[6] See footnote 5, *supra*.

30. The Class of Service Multiplier for Class D-4 service for purposes of calculating regular member contributions on compensation paid prior to July 1, 2001 for members of the General Assembly who elected Class D-4 membership is "one" (1.0). The Class of Service Multiplier for Class AA service for purposes of calculating regular member contributions on compensation paid prior to January 1, 2002 for Class AA members is "one" (1.0). 71 Pa.C.S. §5102 (definition of "Class of service multiplier"). (Stip. 29)

31. Act 9 amended the Retirement Code by adding, in part: "A State employee who after June 30, 2001 . . . is employed in a position in which the member could elect membership in a class of service other than Class AA or Class D-4 shall retain any Class AA service credited prior to . . . being so employed but shall be ineligible to receive Class AA credit thereafter and instead shall receive Class A credit unless a class of membership other than Class A is elected." 71 Pa.C.S. §5306(a.1)(6). (Stip. 30)

32. If the Claimant were successful in receiving Class AA or Class D-4 benefits for his Senate service, SERS would recalculate his benefits as of his effective date of retirement and make retroactive and prospective adjustments to his benefit. 71 Pa.C.S. §5954(b). (Stip. 31)

33. Claimant is currently receiving the COLA effective July 1, 2003; if Claimant is successful in receiving Class AA or Class D-4 benefits for his Senate service, he would not be eligible for the COLA,

and SERS would recalculate his benefits and make retroactive and prospective adjustment to his benefit. 71 Pa. C.S. §5708.7(g)(3), 5954(b). (Stip. 32)

34. Claimant currently receives *per diem* compensation for his service as a senior judge, which compensation is subject to a statutory adjustment based upon (1) the amount of the annuity payment he is receiving from SERS and (2) the salaries of active judges of the court where he serves. 65 P.S. §366.2a(h).[7] (Stip. 33)

35. If Claimant wins on legal theories of general application such that all prior non-judicial and non-legislative state service for judges and district justices should be treated as Class AA and credited at a 2.5% benefit accrual rate for each year of service instead of a 2% benefit accrual rate for each year of service, then:

a. An estimated 96 judges would be affected with a total estimated added present value of benefits resulting from the change of $1,502,200;

b. An estimated 65 district justices would be affected with a total estimated added present value of benefits from the change of $430,700; and

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[7] A retroactive increase in his SERS annuity payments may result in Claimant having been overpaid as a senior judge and may require him to return per diem payments earned as a senior judge. (Stip. 33)

c. The total estimated added present value for an estimated 161 affected judges and district justices is $1,932,900.[8] (Stip. 34)

36. If Claimant wins on legal theories of general application such that only prior legislative service for judges and district justices would be treated as Class D-4 and credited at a 3% benefit accrual rate for each year of service instead of a 2% benefit accrual rate for each year of service, then an estimated seven judges would be affected with an estimated added present value of benefits resulting from the change of $434,200. There seem to be no active district justices with prior Class A legislative service credit.[9] (Stip. 34)

37. If Claimant wins on legal theories of general application such that all SERS members (including members who are not judges or district justices) with

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[8] If called to testify at an evidentiary hearing, the parties agree that SERS consulting actuaries would testify to the actuarial impact of a successful claim by Claimant as outlined in paragraphs 35 and 36, based upon the actuarial data, methods and assumptions as of December 31, 2001 presented in the 2001 Actuarial Report dated April 24, 2002 and further based upon the membership data provided to the actuaries by SERS staff. These determinations include the cost for all SERS members who left State service after July 1,2001 or were active members up to June 2002, but do not include the cost of modified service credit for entrants into SERS after June 2002. (Stip. 34)

The parties have agreed that these actuarial calculations are estimates and that they have changed with the passage of time, but the calculations are contemporaneous with the retirement of Claimant and the implementation of Act 9. (Stip. 34n)

[9] See footnote 8, *supra*.

prior legislative service classified as Class A or Class AA obtain Class D-4 for prior legislative service credited at a 3% benefit accrual rate for each year of service instead of a 2% (Class A) or 2.5% (Class AA) benefit accrual rate for each year of service, then an estimated 19 members would be affected with an estimated added present value of benefits resulting from the change of $982,600.[10] (Stip. 34)

38. If Claimant wins on legal theories of general application such that Class C members, other than State police officers, would elect Class AA and retain the Class C member's annuity and that all prior State service would be credited as Class AA rather than Class A, then an estimated 203 members would be affected with an estimated added present value of benefits resulting from the change of $4,692,700.[11] (Stip. 34)

39. On October 26, 2001, the Claimant requested information from SERS regarding the class of service at which his Senate service was credited and what classes of service were available to him for his service credited as a Class A member of the General Assembly. (Stip. 35, Joint Exhibit 2).

40. On December 17, 2001, SERS informed the Claimant that only Class A service credit was available for his State Senate service and that the SERS

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[10] See footnote 8, *supra*.

[11] See footnote 8, *supra*.

staff would not permit conversion of his State Senate service credit from Class A service credit to Class AA or Class D-4 service credit. SERS also informed Claimant of the procedures to appeal that decision. (Stip. 36, Joint Exhibit 3).

41. On December 27, 2001, the Claimant filed a timely appeal from the SERS staff determination that Class AA or Class D-4 service credit was not available for his State Senate service, seeking an Appeals Committee review of the staff decision. (Stip. 37, Joint Exhibit 4).

42. On February 1, 2002, the SERS Executive Director informed Claimant that the Appeals Committee denied his request to convert his Class A State service credit as a State Senator to Class AA or Class D-4 service credit. (Stip. 38, Joint Exhibit 5).

43. On February 20, 2002 Claimant filed a timely appeal from the Appeals Committee denial of his request to receive Class AA or Class D-4 credit for his Class A service as a member of the General Assembly. (Stip. 39)

44. At the time Claimant requested Class D-4 or Class AA credit for his Senate service, he was an active member of SERS and sitting on Commonwealth Court as an active judge. Claimant's application for an annuity was subject to a reservation of his claim for Class AA or Class D-4 service credit for his State Senate service. (Stip. 40, Joint Exhibit 6.)

45. Claimant has timely appealed SERS' denial of his request. (Stip. 40)

Discussion

The Claimant contends that Act 9 (Act of May 17, 2001, P.L. 26, No. 9) denies him equal protection, is an unconstitutional impairment of his contract for pension benefits and violates constitutional requirements that all members of the General Assembly receive uniform pension benefits. He argues that SERS should interpret Act 9 in a fashion that would recognize a constitutional mandate that would essentially give service of employment in the General Assembly certain attributes that would in turn prevent the General Assembly from conducting its affairs to provide different pension benefits for its own members, depending on when they served in office. We cannot accept the Claimant's view of Act 9 as a reasonable statement of the law; indeed, it is not the law of this Commonwealth and there is no such mandate under either the state or federal constitution.

The Claimant's argument raises various constitutional issues summarized as follows: (1) Act 9 denies Claimant equal protection; (2) Act 9 unconstitutionally impairs his contract for pension benefits; and (3) Act 9 unconstitutionally treats members of the General Assembly differently as it relates to their SERS pension benefits. Claimant's argument for relief in his appeal is to require SERS to interpret Act 9 in such a way as to allow him to elect Class D-4 or Class AA membership. The Claimant bears the burden of proof and persuasion for that argument. *Wingert v. State Employees' Retirement Board,* 589 A.2d 269 (Pa. Cmwlth. 1991).

SERS is a creature of statute and Claimant has only those rights recognized by statute and none beyond. *Bittenbender v. SERB,* 622 A.2d 403 (Pa. Cmwlth.1992), *Cosgrove v. State Employees' Retirement Board,* 665 A.2d 870 (Pa. Cmwlth. 1995). We observe, then, that the statutes have time-barred the Claimant's application for Class D-4 membership in SERS, because Class D-4 elections must be made in writing to SERS by June 30, 2001. 71 Pa. C.S. §5306.2(a). The Claimant first contacted SERS about electing Class D-4 membership on October 26, 2001, almost four months after the election period had expired, and he has posited neither explanation nor argument why SERS should be estopped from asserting this statutory limitation. Therefore, the underlying claim regarding Claimant's D-4 election shall be denied and dismissed. We now address the Claimant's application for Class AA membership.

SERS is governed by its enabling legislation, the State Employees Retirement Code. 71 Pa.C.S. §§ 5101, *et seq.* The State Employees Retirement Board (hereinafter the "Retirement Board") is an independent administrative board of the Commonwealth and as such, is charged with not only the administration of SERS, but also the interpretation of the Retirement Code, subject, of course, to judicial review. 2 Pa.C.S. § 702, 71 Pa.C.S. §§ 5901(a), 5902, and 5931(a). SERS, as an administrative agency charged with execution and application of the retirement statute, is entitled to considerable deference in its construction and interpretation of the retirement statute and the regulations promulgated thereunder. *Card v. Pennsylvania School Employees' Retirement Board,* 478 A.2d 510 (Pa. Cmwlth. 1984, *Christiana v. Public School Employees' Retirement Board,* 646 A.2d 645 (Pa. Cmwlth. 1994), *aff'd,* 669 A.2d 940 (Pa. 1996), *Burris v. State Employees' Retirement Board,* 745 A.2d 704 (Pa. Cmwlth. 2000). As such, SERS' interpretation of the language of the Retirement Code is given considerable respect by the appellate courts, provided of course that it does not fly in the face of the Retirement Code's plain language or appellate authority. Our appellate courts have not heretofore had an opportunity to rule on constitutional challenges to Act 9 as now argued by the Claimant, but we observe that the Retirement Board, in its capacity as an administrative tribunal, has previously issued an adjudication of these very issues in *In re: Account of Donald Snyder, slip op.,* SERB docket No. 2002-01 (May 22, 2002).[12]

The Retirement Board and SERS, as an administrative agency, are not subject to the principle of *stare decisis* to the same degree as is an appellate court, but the obligation remains to either follow, distinguish or overrule the Retirement Board's own precedent. *Dee-Dee Cab, Inc. v. Pennsylvania Public Utility Commission,* 817 A.2d 593 (Pa. Cmwlth. 2003), *Standard Fire Insurance Co. v. Insurance Department,* 611 A.2d 356 (Pa. Cmwlth. 1992).

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[12] The *Snyder* decision has reached finality because the claimant filed no exceptions therein and no appeal or petition was filed with the Commonwealth or Supreme Court.

We are obligated to follow *In re: Account of Donald Snyder, supra.*, because its facts and constitutional analyses are similar to those herein, and we cannot distinguish it. Furthermore, there have been no legislation and no appellate decision bringing about a change in the law since *Snyder* was issued that would compel us to overrule *Snyder.* For these reasons, we shall follow *Snyder's* interpretation of Act 9 as well as its constitutional analyses.

Like the Claimant herein, the claimant in *Snyder* was a member of SERS by virtue of his election to the General Assembly (but as a Representative) for ten consecutive terms, a total of 20 years. After the expiration of his last term, Mr. Snyder continued as an active member of SERS through his employment as the president of a community college, when he sought essentially the same relief[13] on the same legal

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[13] When Snyder was a member of the General Assembly, he was a member of Class A, with a superannuation age of 50. 71 Pa. C.S. § 5102.

Act 9 made significant changes to the State Employees Retirement Code. Act 9 created new classes of service with corresponding class of service multipliers known as "Class AA" and "Class D-4." The class of service multiplier for Class AA, in

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most instances, is 1.25, and for Class D-4 the class of service multiplier is 1.5. Class AA members contribute 6.25% of their retirement-covered compensation paid on or after January 1, 2002, and 5% on compensation paid before that date, and earn benefits that accrue at the rate of 2.5% of final average salary for each year of Class AA service. Class D-4 members contribute 7.5% of their retirement-covered compensation paid after June 30, 2001, and 5% before that date, and earn benefits that accrue at the rate of 3% of final average salary for each year of Class D-4 service. On the other hand, Class A members contribute 5% of their retirement-covered compensation for all service and accrue 2% of final average salary for each year of Class A service.

Act 9 granted most, but not all, state employees who were Class A active members on June 30th and July 1st, 2001, the ability to elect Class AA membership for their future state service. Most active members who elected Class AA also received Class AA service for their past Class A state service.

Former legislators, such as Snyder, who were active members on June 30th and July 1, 2001, as a non-legislator state employee, were also eligible to receive Class AA membership on their prior legislative Class A service. Snyder fell into this category as a result of his position as President of Lehigh Carbon Community College.

Most, but not all, members of the General Assembly who were serving legislators on May 17, 2001, became eligible for Class D-4 members *if they remained as a legislator on July 1, 2001.* If they declined to elect Class D-4 membership, they could elect Class AA membership. Additionally, if they elected Class D-4 membership for their current and future service, the legislators could receive Class D-4 membership for their past General Assembly service. Any other past non-legislative Class A state service could be reclassified as Class AA. Finally, all new legislators who took office after June 30, 2001, and who elected to become current SERS members, became Class D-4 members.

Snyder, and twelve other non-judicial former legislators, could only elect Class AA membership for their past legislative service since they were not legislators on or about July 1, 2001, On the other hand, Act 9 allowed those legislators who were in

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assertions as the Claimant herein, *to wit*: that (1) Act 9 denies Claimant equal protection; (2) Act 9 unconstitutionally impairs his contract for pension benefits; and (3) Act 9 unconstitutionally treats members of the General Assembly differently as it relates to their pension benefits. Like *Snyder*, the Claimant herein argues that certain members of the General Assembly are now singled out for unlawful unequal treatment by SERS.[14]

Snyder considered and rejected the same constitutional arguments regarding Act 9 and the Retirement Code, and concluded that SERS has correctly interpreted Act 9 according to its plain language while observing that Act 9 was constitutional. *In re: Account of Donald Snyder, supra*. Similarly, we conclude that SERS continues to properly interpret Act 9 as a constitutional enactment, and its rejection of the Claimant's application for Class AA membership is correct. SERS has not violated Claimant's rights

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office on July 1, 2001, to elect Class D-4 membership for the same periods of past legislative service. Snyder suggested that the different treatment of similar past legislative service based solely upon whether or not the individual was in office on July 1, 2001, should not be permitted. Specifically, he took issue with SERS' interpretation of Act 9 because of its application to his former legislative service. The Board disagreed, and upheld SERS' interpretation. *In re: Account of Donald Snyder, supra*.

[14] Judges are only one of several categories of state employees who cannot elect Class AA under Act 9. Therefore, it is misguided to attempt to portray Act 9 as excluding only members of the judiciary from Class AA.

guaranteed under the United States and Pennsylvania constitutions.

The facts are undisputed; indeed, they are before this Hearing Examiner solely by virtue of 44 written Stipulations of the Claimant and SERS filed of record on April 16, 2004, with six attached Joint Exhibits.

Claimant first became a member of SERS on May 22, 1974, as a member of the General Assembly. Claimant was elected for three terms and served in the Senate until November 30, 1988, as a Class A active member with a superannuation age of 50; he was credited with 14.5250 years of state service. From December 1, 1984 to November 30, 1988, Claimant's annual salary was $35,000, and from July 1, 1987 to November 30, 1988, he received an annual unvouchered expense allowance of $12,000. SERS recognized this expense allowance as compensation for purposes of the State Employees' Retirement Code. The Claimant became vested when he ended his Senate service, but he made no withdraws or annuity applications. From June 21, 1990 to December 31, 2001, Claimant resumed active membership with SERS as a Commonwealth Court judge, and was credited with 11.5278 years of Class A service with a superannuation age of 60. He was not a member of the Social Security integration program. During his active membership, Claimant elected to become a Class E-1 member and a member of the Social Security integration program for his judicial service (see *Goodheart v. Casey,* 555 A.2d 1210 (Pa. 1989), on reconsideration at 565 A.2d 757 (Pa. 1989), with the result that all of Claimant's service as an active judge is credited as Class E-1 with Social Security integration-covered service. On December 31, 2001, the Claimant reached mandatory retirement, whereupon his active service ended, but he continues to serve as a senior judge and be paid on a *per diem* basis. 65 P.S. §366.2a(h).

The Claimant applied for an annuity effective January 1, 2002, based upon 14.5250 years of Class A service, 11.5278 years of Class E-1 service (with Social Security integration), a final average salary of $126,162.33, and non-covered Social Security integration earnings of $515,597.57. He withdrew a lump sum equal to his total member contributions and credited statutory interest, and he receives an annuity. On July 1, 2003, the Claimant also became eligible for a COLA, which he has been receiving. 71 Pa.C.S. §5708.7 Reduced to its present value, the Claimant's Maximum Single Life Annuity monthly payment on his effective date of retirement (before modification for any optional payment plan) was $8,392.68, with a present value of $1,043,052.36.

After withdrawing an amount equal to his accumulated deductions under Option 4, Claimant's Maximum Single Life Annuity monthly payment (prior to him selecting Option 2 with guaranteed total initial present value payments) was $6,787.58. The Claimant elected to receive $199,484.69 in a lump sum payment, plus a payment of $1,111.74 in post-termination interest, and $5,237.56 in monthly annuity payments (which the COLA subsequently increased to $5,356.45 effective July 1, 2003), with a total guaranteed annuity payment at the time of retirement of $843,567.67.

Meanwhile, the Act 9 legislation had amended the Retirement Code, creating, *inter alia,* two new classes of state service denoted "Class AA" and "Class D-4," with associated new classes of "service multipliers." Accordingly, the Claimant now requests SERS to recalculate his annuity, with his 14.5250 years of General Assembly Class AA service to be credited instead as either Class AA service (or Class D-4) service. The impact upon the Claimant's SERS benefit would be quite substantial. If Claimant is successful in receiving Class AA credit for his 14.5250 years of Senate service, then SERS estimates that his monthly Maximum Single Life Annuity would be approximately $9,156 with a present value of approximately $1,123,020. SERS further estimates the Claimant's (and survivor's) actual benefits would be $5,852 per month for all periods of retirement with a guaranteed total annuity payment of $923,536. The Claimant's lump sum withdraw would not change.[15]

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[15] If Claimant had timely applied for Class D-4 membership and was successful in receiving Class D-4 credit for his 14.5250 years of Senate service, then SERS estimates that his monthly Maximum Single Life Annuity would be $9,919 with a present value of $1,209,478. SERS further estimates that the Claimant's (and survivor's) actual benefits would be $6,399 per month for all periods of retirement with estimated guaranteed total annuity payment of $1,009,922. The Claimant's lump sum withdraw would not change.

SERS has refused the Claimant's application, taking the position that (1) the Retirement Code, specifically Act 9, does not permit Claimant to elect to convert his Class A service as a member of the General Assembly to Class AA (or Class D-4) service, (2) this result is a valid exercise of legislative authority, and (3) Claimant may not receive Class AA (or Class D-4) service credit for his service as a State Senator. 71 Pa. C.S. §§5306, 5306.1, and 5306.2.

Act 9 amendments in Sections 5306, 5306.1, and 5306.2 made significant changes to the Retirement Code, including these new classes of service with corresponding class of service multipliers. The class of service multiplier for Class AA, in most instances, is 1.25 (Class D-4 service multiplier is 1.5).[16] Class AA members contribute 6.25% of their retirement-covered compensation paid on or after January 1, 2002, and 5% on compensation paid before that date, and earn benefits that accrue at the rate of 2.5% of final average salary for each year of Class AA service.[17] On the other hand, Class A members contribute 5% of their retirement-covered compensation for all service and accrue 2% of final average salary for each year of Class A service. *In re: Account of Donald Snyder, supra.*

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[16] Nonetheless, the parties have stipulated and it is a finding of fact that the Claimant's multiplier shall be 1.0 in the event he prevails on his application.

[17] Class D-4 members contribute 7.5% of their retirement-covered compensation paid after June 30, 2001, and 5% before that date, and earn benefits that accrue at the rate of 3% of final average salary for each year of Class D-4 service.

Act 9 granted most, but not all, state employees who were Class A active members on June 30th and July 1st, 2001, the ability to elect Class AA membership for their future state service. Most active members who elected Class AA also received Class AA service for their past Class A state service. *Id.*

The unambiguous language found in Section 5306(a.1)(3) plainly provides that Claimant had to have been a Class A member on July 1, 2001, in order to elect Class AA membership:

> (3) Provided that an election to become a Class AA member is made pursuant to section 5306.1 (relating to election to become a Class AA member), *a State employee,* other than a State employee who is a State police officer on or after July 1, 1989, *who on June 30, 2001, and July 1, 2001, is:*
>
> > (i) *a member of Class A,* other than a member of Class A who could have elected membership in a Class C, Class D-3, Class E-1 or Class E-2; *or*
> >
> > (ii) *an inactive member on a leave without pay from a position in which the State employee would be a Class A active member if the employee was not on leave without pay, other than a position in which the State employee could elect membership in* Class C, Class D-3, *Class E-1* or Class E-2;

> *shall be classified as a Class AA member and receive credit for Class AA State service performed after June 30, 2001,* upon payment of regular member contributions for Class AA service and, subject to the limitations contained in paragraph (7), *shall receive Class AA service credit for all Class A State service, other than* State service performed as a State police officer or *as a State employee in a position for which the member could have elected membership in* Class C, Class D-3, *Class E-1* or Class E-2, *performed before July 1, 2001.*

72 Pa.C.S. §5306(a.1)(3), *emphasis added.* On June 30 and July 1, 2001, Claimant has been Class E-1 member, and is therefore ineligible for Class AA membership.[18] Indeed, the Claimant does not dispute that

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[18] Similarly, Section 5306(a.2)(1) and (2) would have disallowed Claimant's claim for Class D-4 membership, had it been timely, for members of the General Assembly:

> (a.2) Class of membership for members of the General Assembly. –
>
> (1) *A person who:*
>
> *(i) becomes a member of the General Assembly and an active member of the system after June 30, 2001;* or
>
> *(ii) is a member of the General Assembly on July 1, 2001,* but is not an active member of the system because membership in the system is optional pursuant to section 5301 and who becomes an active member after June 30, 2001;
>
> and who was not a State police officer on or after July 1, 1989, shall be classified as a Class D-4

(Continued on following page)

> member and receive credit as a Class D-4 member for all State service as a member of the General Assembly upon payment of regular member contributions for Class D-4 service and, subject to the limitations contained in subsection (a.1)(7), if previously a member of Class A or employed in a position for which Class A service could have been earned shall receive Class AA service credit for all Class A State service, other than State service performed as a State police officer or for which a class of service other than Class A or Class D-4 was or could have been elected or credited.
>
> (2) Provided an election to become a Class D-4 member is made pursuant to section 5306.2 (relating to elections by members of the General Assembly), a State employee who was not a State police officer on or after July 1, 1989, who on July 1, 2001, is a member of the General Assembly and an active member of the system and not a member of Class D-3 shall be classified as a Class D-4 member and receive credit as a Class D-4 member for all State service performed as a member of the General Assembly not credited as another class other than Class A upon payment of regular member contributions for Class D-4 service and, subject to the limitations contained in paragraph (a.1)(7), shall receive Class AA service credit for all Class A State service, other than State service performed as a State police officer or as a State employee in a position in which the member could have elected a class of service other than Class A, performed before July 1, 2001.

71 Pa.C.S. §5306(a.2), *emphasis added* The plain language states that the Claimant would have to have been a member of the General Assembly after June 30, 2001 to qualify for Class D-4

(Continued on following page)

fact, nor does he dispute that the language of Act 9 clearly precludes him from Class AA (or D-4) membership. The Claimant's position is Act 9 is unconstitutional, and the appropriate remedy is to grant him Class AA membership. His argument lacks merit.

Former legislators who on June 30 and July 1, 2001, were Class E-1 state employees (members of the state judiciary) are plainly not eligible to receive Class AA recalculation of their prior legislative Class A service. While it may be true that the Claimant fell into this category as a Commonwealth Court judge, Act 9 provides that judges are only one of several categories of state employees that are precluded from electing Class AA service.[19]

This Hearing Examiner and the Retirement Board are unable to declare Act 9 unconstitutional. *Ruszin vs. Department of Labor and Industry*, 675 A.2d 366 (Pa. Cmwlth. 1996). Consequently, this Hearing Examiner cannot grant Claimant's request

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membership in SERS. The record is quite clear that was not the case.

[19] The Claimant's attempt to portray the Retirement Code (specifically Act 9) as excluding only judges from Class AA is disingenuous. For example, had his application for Class D-4 been timely, the Claimant would be denied his election for Class D-4 for a different reason. Act 9 permits only then-sitting or future legislators to elect Class D-4. Because Class D-4 was limited to then current and future legislators, *not former legislators,* regardless of the post-legislative position they held, the Claimant's status as a judge was irrelevant; the important factor was that he was not a legislator on the date in question.

for relief, which effectively is that we declare Act 9 unconstitutional. However, in order to provide both Claimant and SERS with an analysis on the constitutional issues raised, this Hearing Examiner will provide such an analysis, which largely follows the Retirement Board's adjudication in *In re: Account of Donald Snyder, supra.*

Initially, it should be noted that the burden of proving a statute unconstitutional is on the challenger. A statute is presumed constitutional, and the burden of proving otherwise is heavy. *Morris vs. Public School Employees Retirement System,* 538 A.2d 1385 (Pa. Cmwlth. 1988), *alloc. den.,* 557 A.2d 345 (1989), citing *Bilbar Construction Co. vs. Easttown Township Board of Adjustment,* 141 A.2d 851 (Pa. 1958), and *Milk Control Commission v. Battista,* 198 A.2d 840 (Pa. 1964).

The Claimant's challenge to the constitutionality of Act 9 can be broken into three main arguments. The first argument is his challenge to the statute based upon a denial of equal protection. The second is his challenge to the constitutionality of the statute on the basis of an unconstitutional impairment of contract. The third challenge is that Act 9 is unconstitutional because it treats members of the General Assembly differently as it relates to their pension benefits.

When assessing equal protection challenges to a statute, the first step is to determine which constitutional standard to apply in the analysis. *Hoffman vs.*

Pennsylvania State Employees Retirement Board, 743 A.2d 1014 (Pa. Cmwlth. 2000), *alloc. den.* 761 A.2d 552 (Pa. 2000), citing *Smith v. Coyne,* 722 A.2d 1022 (Pa. 1999). The Pennsylvania Supreme Court stated:

> "Strict scrutiny is applied to classifications affecting a suspect class of fundamental right. Intermediate scrutiny is applied to important rights and "sensitive classification." In all other cases, the challenge of legislation will be upheld unless there is no rational basis for its enactment."

Id. 722 A.2d at 1025. Where the distribution of economic benefits is involved, the General Assembly is free to create classifications so long as those classifications do not discriminate against suspect classes and they bear some rational relationship to legitimate state purposes. *Martin v. Unemployment Compensation Board of Review,* 466 A.2d 107 (Pa. 1983), *cert. denied,* 466 U.S. 952, 104 S.Ct. 2156 (1984). The appropriate scrutiny to apply to this statute is whether or not there was a rational basis for its enactment. *Id.*, and *Morris vs. Public School Employees Retirement System,* 538 A.2d 1385 (Pa. Cmwlth. 1988). The Claimant would have us apply strict scrutiny, relying upon *Klein v. Commonwealth, State Employes' Retirement Board,* 528 A.2d 1071 (Pa. Cmwlth. 1987), *reversed on other grounds* 555 A.2d 1216 (Pa. 1989), *on reconsideration* 565 A.2d 757 (Pa. 1989).

However, as SERS correctly points out, the *Klein* opinion has no precedential value; *Klein* was a plurality opinion, and our appellate courts have been loathe to follow Justice Larsen's reasoning. The analysis set forth in the opinion by Justice Larsen does not provide support for Claimant's position, and more importantly, is not the law of this Commonwealth. The decisions in *Harper vs. State Employees Retirement System,* 624 A.2d 279 (Pa. Cmwlth. 1993), *aff'd.* 649 A.2d 643 (Pa. 1994), and *Rybak vs. State Employees Retirement Board,* 624 A.2d 286 (Pa. Cmwlth. 1993), *aff'd.* 649 A.2d 431 (Pa. 1994), specifically rejected the *Klein*-based equal protection argument followed by Claimant in his analysis. In *Harper* the Supreme Court specifically held that eliminating Class D-3 service for post-1974 legislators was not a violation of equal protection. The key, as the Supreme Court stated, was the legitimacy of the classification; specifically, it said the question is whether the classification is appropriate rather than the adequacy of the compensation. The test, as stated in *Harper,* is whether or not there is a rational basis for the classification at issue, unless the classification affects a suspect group or infringes upon a fundamental right; neither of which applies here. In *Harper,* the General Assembly had established a two-tiered legislative pension scheme, and *Harper* determined that the two-tiered legislative pension scheme in and of itself is not a denial of equal protection. Consequently, on its face, the two-tiered classification scheme of Act 9, as it relates to Claimant and other former and current legislators, is likewise not a denial of equal protection.

Claimant goes on to assert that there is no rational basis for establishing a two-tiered benefit structure. However, there are various reasons for just such an establishment of a multi-tiered benefit structure, such as:

> 1. The need by the General Assembly to be able to adjust compensation packages for the State employees;
>
> 2. Adjusting pension benefits and reallocating the public funds that would otherwise be expended as employee compensation in order to satisfy other societal needs, is a rational means to accomplish legitimate legislative goals; or
>
> 3. The General Assembly may have decided to go with uniformity for the vast bulk of SERS membership even though there were some members, such as Claimant, who would be caught in the position that would not provide them with the same type of benefit increase that current legislators received.

One of these reasons alone would justify the establishment of a multi-tiered benefit structure. The General Assembly does not have to consciously consider any of these goals or clearly articulate them in their legislation to survive a rational basis scrutiny. The only inquiry that needs to occur is whether the classification scheme is such that the varying treatment of different groups or persons is so unrelated to the achievement of any combination of legitimate purposes that the courts can only conclude that the legislators' actions were irrational and thus not legitimate. *Vance vs. Bradley*, 440 U.S. 93, 99 S. Ct. 939 (1979). As shown above, Act 9 has many potential legitimate reasons for its classification scheme and is not so irrational as to not survive a rational basis scrutiny.

Claimant suggests that the fact that prior to its enactment, Act 9 treats former and current legislators differently as it relates to the period of time in which they provided service to the General Assembly, has no rational basis. He argues that such different treatment is therefore, on its face, unconstitutional. His argument lacks merit. The authority is quite clear that a classification scheme that results in some inequality does *not* make it unconstitutional on its face. *Martin vs. Unemployment Compensation Board of Review, supra.* Classifications are not required to be perfect and necessarily cannot be when we are dealing with the myriad of issues involved in government. The courts of this Commonwealth have consistently held that a classification scheme that results in some inequality, if it has some reasonable basis, will not offend the constitution. See *Morris v. Public School Employees Retirement System, supra., Hoffman vs. State Employees Retirement Board,* 743 A.2d 1014 (Pa. Cmwlth. 2000), *alloc. den.* 761 A.2d 552 (Pa. 2000). There is no question that Act 9 treats Claimant, and certain other former legislators, differently from current legislators as it relates to the treatment of past legislative service. This disparate treatment, however, does not render Act 9 unconstitutional as suggested by Claimant. Statutes are not perfect; nor are they required to be. But it is quite clear that there is a reasonable basis for Act 9's different treatment or members of the General Assembly.

The Claimant bears a heavy burden to show that Act 9 clearly, plainly and palpably violates the equal protection clauses of the Pennsylvania and United States constitutions, *Latella v. Commonwealth, Unemployment Compensation Board of Review,* 459 A.2d 464 (1983), and doubts about the validity of his challenge are to be resolved in favor of constitutionality. *Hays v. Erie Insurance Exchange,* 425 A.2d 419 (Pa. 1981). His reliance upon *Klein* as his sole legal authority for his argument indicates how insubstantial his argument is. The Supreme Court has affirmed rulings finding that Justice Larsen's opinion has no precedential value. *Harper v. State Employees' Retirement System,* 624 A.2d 279 (Pa. Cmwlth. 1993), *aff'd* 649 A.2d 643 (Pa. 1994) and *Rybak v. State Employees' Retirement Board,* 624 A.2d 286 (Pa. Cmwlth. 1993), aff'd. 649 A.2d 431 (Pa. 1994). As a plurality opinion, *Klein* lacks the weight and value of precedent. *Le Gare v. Commonwealth. Unemployment Compensation Bd. of Review,* 444 A.2d 1151, 1154, n.3

(Pa. 1982).[20] We remain unpersuaded by the Claimant's attempt to distinguish this authority.

Applying the rational basis test, the Claimant would assert that there is no rational basis for establishing a two-tier pension benefit structure, notwithstanding the valid public policy need for the General Assembly to be able to adjust the compensation packages of state employees. The General Assembly must be free to respond to changing economic circumstances by reducing the level of pension benefits for individuals who are not yet state employees, or to increase benefits within the limits of fiscal resources. The legislature must from time to time adjust pensions to keep up with economic reality, such as when it grants cost of living adjustments (COLAs) or otherwise increases benefits, as it did in Act 9. However, as noted by SERS, even when benefits are increased, the limited size of the public treasury constitutes a legitimate basis for permitting the General Assembly to limit future pension benefits to certain individuals, especially when a benefit increase is for past service. In its brief, SERS cites a surfeit of rational reasons justifying Act 9's limitation of benefits that deny non-Class A members generally, and members of the judiciary particularly, their ability to receive Class AA credit for their Class A service. Most obvious is the economic impact to SERS and on the taxpayers of this Commonwealth. A successful claim by the Claimant would result in a significant increase in not only his pension benefits, but others as well. The actuary's estimates in the parties' stipulations indicate there will be significant costs to the Retirement System and in turn, the Commonwealth and the taxpayers; these alone are sufficient to make the General Assembly's benefit allotment under Act 9 pass a rational basis test under *Harper* and *Rybak.*

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[20] *Klein* is further discredited because, after re-argument of *Klein* before the Supreme Court, none of the justices who concurred in Justice Larsen's analysis were part of the deciding court, when it did not adopt his equal protection approach.

There are a multitude of other rational reasons justifying Act 9's two-tier pension scheme that does not extend Class AA to members who were receiving special class benefits (such as Class E-1 judges). One reason is the General Assembly's acknowledgment that members of special classes generally, and judges in particular, were already receiving benefits well in excess of those received by rank and file Class A state employees, before Act 9.[21] SERS posits several other plausible reasons for the enactment of the two-tier pension scheme, but we need not review them all, because where such reasons exist to justify the General Assembly's actions, our review is at an end. *United States Railroad Retirement Board v. Fritz,* 449 U.S. 166, 101 S.Ct. 453 (1980). *Fleming v. Nestor,* 363 U.S. 603, 80 S.Ct. 1367, 4 L.Ed. 2d 1435 (1960). *Vance v. Bradley, supra.* So long as there is some rational basis for the legislation that has resulted in some inequality, that inequality does not alone justify a finding that the enactment is unconstitutional. See, *Martin v. Unemployment Compensation Board of Review, supra.* The Commonwealth Court has ruled that in pension matters, when reviewing whether a classification is rational, the court may conclude there is justification for an enactment without a record of evidence or legislative history to justify the classification. *Hoffman v. Pennsylvania State Employes' Retirement Board, supra.* A statutory discrimination will not be set aside if any state of facts reasonably may be conceived to justify it. *Morris v. Public School Employes' Retirement System, supra.* Clearly, then there is a rational basis for the two-tier pension scheme in Act 9, which results in different treatment of current and former legislators, impacting their eligibility for Class AA service, and there is on affront to constitutional equal protection.

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[21] Judges' benefits were approximately double the benefits available to Class A employees. As SERS succinctly states: "A superannuated Class A employee with 20 years of service would receive 40% of final average salary. A superannuated Class E-1 judge would receive 70% of final average salary, plus be eligible for SSI, which would produce a variable, but significant (most likely in excess of an additional 0% of final average salary) additional benefit. 71 Pa. C.S. §5702(a). Additionally, judges have the ability to work as a senior judge and continue to receive their annuity. 65 P.S. §366a.2(h). The ability of most annuitants to work for the Commonwealth and to continue to receive their annuity is greatly restricted. 71 Pa. C.S. §5706." (SERS brief, 23n)

The Claimant's second major constitutional attack upon Act 9 is that it unconstitutionally impaired his contractual rights, but the irony is that he argues he is injured because the Act did not *increase* his pension benefits from his prior legislative service. There is no evidence whatsoever that the Claimant has suffered a reduction in his pension benefit, and the Claimant fails to meet his heavy burden in this regard. His disappointment at not receiving the benefit enhancements that others had received does not constitute an unconstitutional impairment of contractual rights. *Harper v. State Employes' Retirement System, supra.* We will not jump to the conclusion reached by Claimant that an enhancement enjoyed by others becomes an impairment of contract, simply because he did not benefit.

The last argument raised by Claimant is that Act 9 is unconstitutional because he, and other members of the General Assembly who provided service at the same time, are not going to receive uniform pension benefits. Essentially this is another way to attack the two-tiered benefit structure contained in Act 9. The Retirement Board has ruled on this specific challenge in *In re: Account of Donald Snyder, supra.,* where it was observed that the Supreme Court of Pennsylvania has repeatedly ruled that two-tiered pension plans, which provide different benefits for similarly situated employees, are permissible. See *City of Allentown vs. Local 302 International Association of Fire Fighters,* 512 A.2d 1175 (Pa. 1986) (where the Supreme Court reversed the Commonwealth Court's decision that Allentown was required to give all its fire fighters the same benefit structure); *Pennsylvania Federation of Teachers vs. School District of Philadelphia,* 484 A.2d 751 (Pa. 1984) (where the

Supreme Court struck down the unilateral reduction in benefits to current school employees, rejecting arguments that because the reductions in benefits could not apply to current school employees it was improper to apply them to future employees); and *Shiomos v. State Employees Retirement Board,* 626 A.2d 158 (Pa. 1993), (where the Supreme Court established that substantive pension rights can be dependent upon the date of the formation of the employment contract). The Claimant has failed to show his contract rights have been impaired.

As stated above, the Supreme Court has approved two-tiered pension plans as they relate to legislative pension plans, as indicated in the cases of *Harper* and *Rybak.* These cases generally stand for the proposition that there is no provision in the Pennsylvania Constitution that would mandate that members of the legislature receive uniform compensation.[22] As we have previously observed, the General Assembly has the ability and the power to determine their own compensation, and should the legislature enact a two-tiered pension scheme that results in a different benefit for legislators who served at the same time, it may do so. There is simply no constitutional requirement that mandates that all employees, who are similarly situated, be given the same compensation, such as a deferred pension benefit.[23]

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[22] This is in contrast with the mandate of uniform compensation and uniform pension plans for the judiciary, in order to ensure the constitutional requirement of judicial independence and separation of power from the other branches of government.

We conclude that the Claimant has failed to satisfy his burdens of proof. *Latella v. Commonwealth, Unemployment Compensation Board of Review, supra., Hays v. Erie Insurance Exchange, supra., Wingert v. State Employes' Retirement Board, supra.*

Conclusions of Law

1. SERS is a creature of statute, and therefore an employee member of SERS has only those rights created by statute and none beyond. *Bittenbender vs. State Employees' Retirement Board,* 622 A.2d 403 (Pa. Cmwlth. 1992).

2. The Claimant failed to make a timely request to elect Class D-4 membership, and therefore his application was properly denied; as a result, Claimant

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[23] SERS, in its brief on Pages 35 through 38, cites numerous examples when two state employees, including members of the legislature, can be working next to each other doing the same work and still not receive the same deferred compensation under the Retirement Code and Act 9. Those will not be restated here but provide a clear understanding of the different treatment required by Act 9 and the Retirement Code generally. None of those employees would have a constitutional challenge to their disparate treatment, if any, as a result of the Retirement Code and Act 9. To sustain Claimant's position, all of those employees would have a constitutional challenge as well. This Hearing Examiner does not believe that such a constitutional challenge in these situations is warranted either.

failed to preserve his constitutional challenges regarding SERS' refusal to grant D-4 membership. 71 Pa. C.S. Section 5306.2(a).

3. SERS, as an administrative agency, is not subject to the principle of *stare decisis* to the same degree as is an appellate court, but it does have the obligation to either follow, distinguish or overrule its own precedent. *Dee Dee Cab, Inc., vs. Pennsylvania Public Utility Commission,* 817 A.2d 593 (Pa. Cmwlth. 2003); *Standard Fire Insurance Company vs. Insurance Department,* 611 A.2d 356 (Pa. Cmwlth. 1992).

4. SERS correctly interpreted Act 9 in that it precludes Claimant from electing membership in Class AA.

5. As an administrative agency and a creature of statute, the Retirement Board cannot declare its own enabling legislation unconstitutional. *Ruszin vs. Department of Labor and Industry,* 675 A.2d 366 (Pa. Cmwlth. 1996).

6. Act 9 does not deny Claimant equal protection. *Harper vs. State Employees' Retirement System,* 624 A.2d 279 (Pa. Cmwlth. 1993), *aff'd* 649 A.2d 643 (Pa. 1994); and *Rybak vs. State Employees' Retirement Board,* 624 A.2d 286 (Pa. Cmwlth. 1993), *aff'd* 649 A.2d 431 (Pa. 1994).

7. Act 9 does not unconstitutionally impair Claimant's contractual rights as it relates to his pension benefits. *Harper vs. State Employees' Retirement*

System, 624 A.2d 279 (Pa. Cmwlth. 1993), *aff'd* 649 A.2d 643 (Pa. 1994).

8. The two-tiered benefit structure of Act 9 is not unconstitutional. *City of Allentown vs. Local 302 International Association of Fire Fighters,* 512 A.2d 1175 (Pa. 1986); *Pennsylvania Federation of Teachers vs. School District of Philadelphia,* 484 A.2d 751 (Pa. 1984); and *Shiomos v. State Employees Retirement Board,* 626 A.2d 158 (Pa. 1993).[24]

Recommendation

The Hearing Examiner recommends that Claimant's request that SERS interpret Act 9 in a manner to allow him to elect Class AA or D-4 membership be DENIED. Furthermore, Act 9 is constitutional.

Respectfully submitted,

BY: /s/ Michael L. Bangs
MICHAEL L. BANGS
Hearing Examiner

Date: 9-14-04

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[24] As also noted, the Retirement Board has ruled on this specific challenge in *In Re: Account of Donald Snyder,* slip op., SERB Docket No. 2002-01 (May 22, 2002).

APPENDIX "D"

71 Pa.C.S.A. § 5306. Classes of service

(a) Class A membership. – A State employee who is a member of Class A on the effective date of this part or who becomes a member of the system subsequent to the effective date of this part shall be classified as a Class A member and receive credit for Class A service upon payment of regular and additional member contributions for Class A service, provided that the State employee does not become a member of Class AA pursuant to subsection (a.1) or a member of Class D-4 pursuant to subsection (a.2).

(a.1) Class AA membership. –

(1) A person who becomes a State employee and an active member of the system after June 30, 2001, and who is not a State police officer and not employed in a position for which a class of service other than Class A is credited or could be elected shall be classified as a Class AA member and receive credit for Class AA State service upon payment of regular member contributions for Class AA service and, subject to the limitations contained in paragraph (7), if previously a member of Class A or previously employed in a position for which Class A service could have been earned, shall have all Class A State service (other than State service performed as a State police officer or for which a class of service other than Class A was earned or could have been elected) classified as Class AA service.

(2) A person who is a State employee on June 30, 2001, and July 1, 2001, but is not an active member of the system because membership in the system is optional or prohibited pursuant to section 5301 (relating to mandatory and optional membership) and who becomes an active member after June 30, 2001, and who is not a State police officer and not employed in a position for which a class of service other than Class A is credited or could be elected shall be classified as a Class AA member and receive credit for Class AA State service upon payment of regular member contributions for Class AA service and, subject to the limitations contained in paragraph (7), if previously a member of Class A or previously employed in a position for which Class A service could have been earned, shall have all Class A State service (other than State service performed as a State Police officer or for which a class of service other than Class A was earned or could have been elected) classified as Class AA service.

(3) Provided that an election to become a Class AA member is made pursuant to section 5306.1 (relating to election to become a Class AA member), a State employee, other than a State employee who is a State police officer on or after July 1, 1989, who on June 30, 2001, and July 1, 2001, is:

(i) a member of Class A, other than a member of Class A who could have elected membership in a Class C, Class D-3, Class E-1 or Class E-2; or

(ii) an inactive member on a leave without pay from a position in which the State employee would be a Class A active member if the employee was not on leave without pay, other than a position in which the State employee could elect membership in Class C, Class D-3, Class E-1 or Class E-2;

shall be classified as a Class AA member and receive credit for Class AA State service performed after June 30, 2001, upon payment of regular member contributions for Class AA service and, subject to the limitations contained in paragraph (7), shall receive Class AA service credit for all Class A State service, other than State service performed as a State police officer or as a State employee in a position for which the member could have elected membership in Class C, Class D-3, Class E-1 or Class E-2, performed before July 1, 2001.

(4) Provided that an election to become a Class AA member is made pursuant to section 5306.1, a former State employee, other than a former State employee who was a State police officer on or after July 1, 1989, who on June 30, 2001, and July 1, 2001, is a multiple service member and a school employee and a member of the Public School Employees' Retirement System, subject to the limitations contained in paragraph (7), shall receive Class AA service credit for all Class A State service, other than State service performed as a State police officer or as a State employee in a position in which the former State employee could have elected a class of service other than Class A, performed before July 1, 2001.

(5) A former State employee, other than a former State employee who was a State police officer on or after July 1, 1989, who is a school employee and who on or after July 1, 2001, becomes a multiple service member, subject to the limitations contained in paragraph (7), shall receive Class AA service credit for all Class A State service other than State service performed as a State employee in a position in which the former State employee could have elected a class of service other than Class A.

(6) A State employee who after June 30, 2001, becomes a State police officer or who is employed in a position in which the member could elect membership in a class of service other than Class AA or Class D-4 shall retain any Class AA service credited prior to becoming a State police officer or being so employed but shall be ineligible to receive Class AA credit thereafter and instead shall receive Class A credit unless a class of membership other than Class A is elected.

(7)(i) State service performed as Class A service before July 1, 2001, and State service for which Class A service could have been credited but was not credited because membership in the system was optional or prohibited pursuant to section 5301 shall be credited as Class AA service only upon the completion of all acts necessary for the State service to be credited as Class A service had this subsection not been enacted and upon payment of required Class AA member contributions as provided in section 5504 (relating to member contributions for the purchase of credit for previous State service or to become a full coverage member).

(ii) A person who is not a State employee or a school employee on June 30, 2001, and July 1, 2001, and who has previous State service (except a disability annuitant who returns to State service after June 30, 2001, upon termination of the disability annuity) shall not receive Class AA service credit for State service performed before July 1, 2001, until such person becomes an active member, or an active member of the Public School Employees' Retirement System and a multiple service member, and earns three eligibility points by performing credited State service or credited school service after June 30, 2001.

(a.2) Class of membership for members of the General Assembly. –

(1) A person who:

(i) becomes a member of the General Assembly and an active member of the system after June 30, 2001; or

(ii) is a member of the General Assembly on July 1, 2001, but is not an active member of the system because membership in the system is optional pursuant to section 5301 and who becomes an active member after June 30, 2001;

and who was not a State police officer on or after July 1, 1989, shall be classified as a Class D-4 member and receive credit as a Class D-4 member for all State service as a member of the General Assembly upon payment of regular member contributions for Class D-4 service and, subject to the limitations contained in subsection (a.1)(7), if previously a member of Class A or employed in a position for which Class A service could have been earned, shall receive Class AA service credit for all Class A State service, other than State service performed as a State police officer or for which a class of service other than Class A or Class D-4 was or could have been elected or credited.

(2) Provided an election to become a Class D-4 member is made pursuant to section 5306.2 (relating to elections by members of the General Assembly), a State employee who was not a State police officer on or after July 1, 1989, who on July 1, 2001, is a member of the General Assembly and an active member of the system and not a member of Class D-3 shall be classified as a Class D-4 member and receive credit as a Class D-4 member for all State service performed as a member of the General Assembly not credited as another class other than Class A upon payment of regular member contributions for Class D-4 service and, subject to the limitations contained in paragraph (a.1)(7), shall receive Class AA service credit for all Class A State service, other than State service performed as a State police officer or as a State employee in a position in which the member could have elected a class of service other than Class A, performed before July 1, 2001.

(3) A member of the General Assembly who after June 30, 2001, becomes a State police officer shall retain any Class AA service or Class D-4 service credited prior to becoming a State police officer or being so employed but shall be ineligible to receive Class AA or Class D-4 credit thereafter and instead shall receive Class A credit.

(b) Other class membership. –

(1) A State employee who is a member of a class of service other than Class A on the effective date of this part shall retain his membership in that class until such service is discontinued; any service thereafter shall be credited as Class A service, Class AA service or Class D-4 service as provided for in this section.

(2) Notwithstanding any other provision of this section, a State employee who is appointed bail commissioner of the Philadelphia Municipal Court under 42 Pa.C.S. § 1123(a)(5) (relating to jurisdiction and venue) may, within 30 days of the effective date of this sentence or within 30 days of his initial appointment as a bail commissioner, whichever is later, elect Class E-2 service credit for service performed as a bail commissioner. This class of service multiplier for E-2 service as a bail commissioner shall be 1.5.

(c) Class membership for county service. – Notwithstanding subsection (a), county service that is converted to State service pursuant to section 5303.1 (relating to election to convert county service to State service) shall be credited as the following class of service:

Class of service in a county of the second class A, third class, fourth class, fifth class, sixth class, seventh class or eighth class maintaining a retirement system or pension plan under the act of August 31, 1971 (P.L. 398, No. 96),[1] known as the County Pension Law	System Class of Service
Class 1-120	G
Class 1-100	H
Class 1-80	I
Class 1-70	J
Class 1-60	K

Rate of accrual of benefit for each year of service in a county of the first class or second class or credited in the Pennsylvania Municipal Retirement System	System Class of Service
.833%	G
1.00%	H
1.250%	I
1.428%	J
1.667%	K
2.000%	L
2.200%	M
2.500%	N

(d) Class of service for converted school service and nonschool service. – If a member elects to convert credited service from the Public School

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[1] 16 P.S. § 11651 et seq.

Employees' Retirement System to the system pursuant to section 5303.2 (relating to election to convert school service to State service), then Class T-C school service and all nonschool service credited in the Public School Employees' Retirement System shall be converted to credited service in the system and credited as Class A State service or nonstate service respectively, and Class T-D school service credited in the Public School Employees' Retirement System shall be converted to credited service in the system and credited as Class AA State service.